Supreme Court, U.S.
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IN THE SUPREME COURT

OF THE UNITED STATES

October Term 1993

A. G. Edwards Jr., petitioner

v.

First American Title Insurance Company and John Hancock Mutual Life Insurance Company, et al, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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June 26, 1994

35 pp

QUESTION PRESENTED

Should a recent unanticipated substantive injury move forward the accrual date of a much earlier relevant Statute of Limitations, when this second and consequential injury occurred years later but directly resulted from that acknowledged earlier malfeasant event which originally commenced this Statute of Limitations?

In event of a favorable determination on the above question, should this Court then direct the Court below to effectuate personal New Hampshire jurisdiction (as authorized under terms of the petitioner-invoked 18 U.S.C. ~ 1965(b)) over those individual defendants whom the Trial Court had previously dismissed despite an 18 U.S.C. ~~ 1961-68 claim having been included in the pleadings?

LIST OF PARTIES

The parties to the proceedings below were the petitioner A.G. Edwards Jr., together with the Respondents now before this Court who include First American Title Insurance Co., John Hancock Mutual Life Insurance Co., Harold Pearson III, William Gordon, John G. McElwee, Stephen Brown, Thomas L. McKiernan, Arthur Duncan, Prince A. Hawkins and the firm Hawkins, Rhodes & Sharp.

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The First Circuit's determinations in this Matter transgress the general concept that a Federal Court petitioner is entitled to equitable and substantial Justice and to a full hearing upon the Merits of his Cause of Action.

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TABLE OF AUTHORITIES

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Haines v. Kerner, 404 U.S. 519, 520-21 Page 22.

Rowe v. John Deere, 130 N.H. 18, 21-23, 533 A.2d 375, 376-78 (1987. Pages 15,18.

Sorenson v. Pavlikowski, 94 Nev. 440, 443-44, 581 P.2d 851, 853-54 (1978) Pages15,18.

Statutes:

18 U.S.C. Sections 1961 - 1968 Pages 1,16,1719,20.

28 U.S.C. Section 1254 (1) Page 10.

28 U.S.C. Section 1291 Page 10.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

A. G. Edwards Jr.,
v.
First American Title Insurance Co., John Hancock Mutual Life Insurance Co., et al,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner A. G. Edwards Jr. respectfully prays that a Writ of Certiorari issue to review the March 29, 1994 Judgment of the United States Court of Appeals for the First Circuit. A determination in this Matter by this Supreme Court will then constitute a necessary exercise of this Supreme Court's powers of supervision regarding the crucial specific points in question as raised in this petition, and will then impose a much needed consistency as to how similar issues are determined throughout the Circuits.

OPINIONS BELOW

The Final Orders of United States Court of Appeals for the First Circuit, not found among reported citations, are reprinted in the Appendix hereto at Item C. No other Decisions, Opinions nor Interpretations have come from the First Circuit Court relating to this Matter, save the First Circuit's Denial of Respondent's Motion for Summary Affirmance dated October 7, 1993, Appendix Item A; and Order Denying appellant's Motion to be Allowed Oral Argument, Appendix Item B.

Orders and Judgments of the Trial Court include (i) a March 23, 1993 Order Dismissing all seven individual Defendants as well as the firm of Hawkins, Rhodes and Sharp and the John Hancock Mutual Life Insurance Company, and transferring to the District of

Nevada the Defendant First American Title Insurance Company, Appendix Item D; and (ii) and (iii) the Trial Court's July 8 and 9, 1993 Orders Granting Final Judgment as to the above described March 23,1993 Dismissals, Appendix Items E & F.

JURISDICTION

Invoking Federal jurisdiction under 28 U.S.C. Section 1332, the petitioner brought this action in the District of New Hampshire. On July 8, 1993, the New Hampshire Trial Court dismissed petitioner's Action as against all individual Defendants, against Hawkins, Rhodes & Sharp and against John Hancock Mutual Insurance Co., transferring Defendant First American to the District of Nevada--having taken only limited evidence and having held no hearing upon the Merits of petitioner's Causes of

Action or on any other point in question. Petitioner Moved for Reconsideration, Denied by New Hampshire District Court.

Petitioner was compelled to Appeal. The First Circuit, allowing no Oral Argument, on March 29, 1994 issued its Order and Judgment to affirm the District Court determination. The First Circuit Judgment specifically ruled that the relevant Statute of Limitations pertaining to the within Causes of Action had accrued on August 15, 1985, and that appellant's consequential further injury, deriving years later and although directly due to Respondents' original malfeasance, would not advance nor update the original 1985 Statute of Limitations accrual. This Appellate Court's determination therefore totally barred the petitioner from his substantial Cause of Action against

the dismissed individual parties.

Had the Court instead determined to advance accrual date of the original Statute of Limitations to occurrence of this consequential second injury occasioned petitioner by Respondents, those individual adverse parties permanently dismissed by the Appellate Judgment would properly remain under the timely Jurisdiction of the Trial Court then to answer for their documented and sequential transgression.

JURISDICTIONAL STATUTES

The Jurisdiction of this Supreme Court to review the Judgment of the First Circuit is invoked under 28 U.S.C. Section 1254(1). Submission of this Petition is timely when the established ninety-day period from the First Circuits' March 29, 1994 final Judgment extends through June 27, 1994.

STATUTES AND AUTHORITIES RELIED UPON

28 U.S.C. Section 1291:

"Final Decision of district courts. The Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . "; and

28 U.S.C. Section 1254(1):

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party. . . ."

STATEMENT OF THE CASE

The petitioner is owner of Saval Ranching Company (hereafter, Saval), a Nevada agricultural property whose real estate loans in 1983 became delinquent to its lender, John Hancock Insurance Co. (hereafter, Hancock). This delinquency caused this lender to foreclose on August 15, 1985, acting through its Deed of Trust holder, First American Title

Company (hereafter, First American).

Hancock, First American and their Counsel, (Respondents P.A. Hawkins and Hawkins, Rhodes & Sharp (hereafter, Hawkins)) together mis-advertised the foreclosure sale of the specific Saval properties. Due to this Respondent error,all legally required advertisements published to notice the Saval sale specifically withheld conveyance of the mineral, oil and gas rights from the listing of pledged assets being foreclosed and sold--despite these oil, mineral and gas deposits comprising major asset component of Respondents' original loan security from Saval, pledged as well in Saval's Deed of Trust securing this Hancock loan.

Petitioner was extensively injured by this Respondent inattentive omission. United States Federal Court three years

later then totally voided Respondents' foreclosure because it had indeed been defectively noticed and improperly carried out by Respondents. The Federal Court's necessary Reversal of Respondents' mismanaged foreclosure and sale even further injured the petitioner.

Although the New Hampshire petitioner sought justice and redress in the Federal Courts System, District Court of New Hampshire dismissed all the individual Defendants, plus Hancock and Hawkins, before hearing any evidence upon the Merits, on the grounds that it lacked personal jurisdiction over the individual defendants including the firm of Hawkins. The New Hampshire Trial Court also refused to transfer these defendants to some other forum where the Court presumed personal jurisdiction over these dismissed parties to be more solid. The

Trial Court also dismissed Hancock, already before the District Court of Massachusetts.

When petitioner Appealed from this emasculating Trial Court Dismissal and the simultaneous transfer of First American to the faraway District of Nevada, the First Circuit affirmed the District Court's original Judgment and determinations. The Appellate Court ruled that transfer of the dismissed parties to a District of more solid personal jurisdiction would have been inappropriate because, as the Court of Appeals determined the within question, the applicable Statute of Limitations had already expired before these individual defendants had been served with a Summons and Complaint.

However, Edwards had sought to demonstrate that his mid-1990 loss of

his U.S. Forest Service Grazing Resource, directly deriving from Respondents' defective 1985 foreclosure, should thus move the herein 1985 Statute of Limitations accrual date forward to mid-1990. This advance of the accrual date would then render all named defendants still answerable under relevant Statutes of Limitations for both negligence and contract claims, and under the invoked 18 U.S.C. ~~ 1961 - 1968 as well.

The petitioner had asked the Court to recognize that his mid-1990 loss of his consequential U.S. Forest Service Grazing resource derived directly from the underinclusive and mishandled 1985 foreclosure carried out by the Respondent group.This mid-1990 injury constituted such major and unanticipated injury as to justify a move forward of the Statute of

Limitations accrual also to mid-1990. The Appeals Court disagreed and ruled at mid page 10. of its Opinion, "The fact that a plaintiff subsequently suffers some additional harm that may be traced to the same likely cause does not delay accrual of the cause of action."

The Court premised this position upon two State Court proceedings never yet adjudicated before any Federal Bench, Rowe v. John Deere, 130 N.H.18, 21-23, 533 A. 2d 375,376-78 (1987), and Sorenson v. Pavlikowski, 94 Nev. 440, 443-44, 581 P. 2d 851, 853-54 (1978), both of which State Court cases appear significantly off point when compared with the within questions presented by petitioner on Page 1. of the within application for Writ. Hence, the petitioner respectfully asks this Supreme Court to determine that neither of the Appellate Court's Case Law

Authorities cited in the First Circuit Judgment should apply to the within proceeding, neither Rowe v. John Deere nor Sorensen v. Pavlikowski.This would then withdraw the crucial basis for the Appeals Court to have affirmed the Trial Court Judgment, and the proceeding could be remanded for Trial, as Justice would entitle.

Had the Appellate Court originally found that appellant's major mid-1990 loss of his Forest Service Grazing Resource did indeed move forward the accrual of the original 1985 Statute of Limitations, then appellants' claims against all named Defendants for both negligence and contract would remain eminently timely at this present date.

In addition, had the Appellate Court then followed 18 U.S.C. ~ 1965(b), which basis for claim had been cited by

petitioner in this case, personal jurisdiction over any named but non-New Hampshire defendant would have been rendered solid:

> "(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court the court may cause such parties to be summoned. . ." 18 U.S.C. Section 1965(b) (in part).

REASONS FOR GRANTING THE WRIT

In essence, petitioner prays this Supreme Court to determine that a directly deriving consequential injury which could not be foreseen and which occurs multiple years following accrual of the original Statute of Limitations does indeed move accrual of that Statute of Limitations forward to time of the more recent substantial injury, when this subsequent injury derives directly from

the original malfeasant event which initiated the original Statute of Limitations.

Petitioner petitions this Supreme Court to determine that the two above State Court decisions cited as determinant case law by the Appellate Court, Rowe v. Deere and Sorenson v. Pavlikowski, supra, cannot control an Appeals Court determination when neither State Court Action has ever been heard on Federal Appeal or even adjudicated in a Federal Forum--and where no other governing case law from higher tribunals exists to guide or to control the questions raised in petitioner's Appeal.

Petitioner thus respectfully submits that the Judgment of the Court of Appeals and the Trial Court in this Matter should be reversed.

Under instructions within 18 U.S.C.

~ 1965(b), invoked by the petitioner in his Cause of Action, personal New Hampshire jurisdiction over each named Defendant would then be readily assertable.

Circumstances set forth in the preceding paragraphs appear to call for an exercise of this Supreme Court's power of supervision, particularly to clarify a major potential injustice presently prevailing within the Civil Justice System and relating especially to the within Action, disadvantaging this petitioner. This currently prevailing inequity in the Federal Court System causes a party to be deprived of all access to Justice when a subsequent consequential injury derives from a significantly earlier malfeasance where Statutes of Limitations, as herein. In this instance, prior expiration of an

earlier Statute of Limitations can then deprive a party from appropriate hearing and redress pertaining to the subsequent consequential injury occasioned him by earlier acts of the original malfeasants.

Petitioner respectfully then further prays that this Supreme Court reverse the Court below and Rule that provisions of 18 U.S.C. ~ 1965 (b) should then be applied to achieve valid New Hampshire personal jurisdiction over each named individual defendant herein and over the firm of Defendant Hawkins, Rhodes & Sharp.

Petitioner particularly cites the incomplete basis for Trial Court and Appeals Court determinations herein when both fora reached their decisions and issued their Judgments absent any hearing or oral argument.

Petitioner was left only the

alternative to bring his request for Writ of Certiorari when there clearly exists within the Federal Court System a disharmony and potential for substantial injustice, where unforseen subsequent and consequential injuries are denied redress because a relevant and originating Statute of Limitations period has expired. There exists compelling need for guidance and direction in this Matter by this Supreme Court, and for the establishment of a constancy which any movant is entitled to enjoy in deriving the efficient, expedient and cost-effective Substantial Justice which Federal Rules and related authority seek to guarantee.

The pro se movant feels regret and embarrassment at his needs to invoke applicable Case Law prescribing that an unrepresented party be held to less rigid

standards than those required of counseled parties.

However, directives in Haines v. Kerner, in Elliott v. Bronson and in many other references specify that a party without counsel shall have his unskilled appearance treated with more generous tolerance. The petitioner respectfully and hesitatingly invokes this guideline, which the First Circuit chose not to follow. [Elliott v. Bronson, 872 F. 2d 20 (C.A. 2d, 1989) and Haines v. Kerner, 404 U.S. 519,520-21.]

Any Court of Appeals, including the First, sends an unfortunate message abroad when it employs improvident and exclusionary bases to deny any party's access to the Substantial Justice envisioned by Federal guidelines.
It thus appears incumbent that the Supreme Court establish precise rulings

as to how these matters are to be decided throughout the Circuits.

SUMMARY AND CONCLUSION

For the above reasons, this Petition for Certiorari should be granted.

Petitioner expresses sincere appreciation to this Supreme Court for its consideration of his entreaty.

Respectfully submitted

by petitioner:

_____

A. G. Edwards Jr.

June 26, 1994

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APPENDIX

Appendix **A**

APPEALS COURT ORDER OF OCTOBER 7, 1993:

United States Court of Appeals for the First Circuit

No. 93-1873

A. G. Edwards Jr., plaintiff, appellant

v.

First American Title Insurance Co., et al, Defendant, Appellees.

ORDER OF COURT

Entered October 7, 1993

The motion for summary affirmance by appellees First American Title Company, John Hancock Mutual Life Insurance Company, Harold Pearson III, William Gordon, John G. McElwee, Stephen Brown, Thomas L. McKiernan and Arthur Duncan is denied but appellees may treat their memorandum in support of their motion as

appellees' brief. The appeal will be decided in due course.

By the Court:

Francis P. Scigliano
Clerk

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APPENDIX B

APPEALS COURT ORDER OF JANUARY 19, 1994:

United States Court of Appeals for the First Circuit

No. 93-1873

A. G. Edwards Jr., plaintiff, appellant,

v.

First American Title Insurance Co., et al, Defendants, Appellees.

Before

Breyer, Chief Judge,

Selya and Cyr, Circuit Judges

ORDER OF COURT

Entered January 19, 1994

Appellant's letter motion for oral argument of this appeal is denied.

By the Court:

Francis P. Scigliano, Clerk

By: Daniel F. Loughry,

Chief Deputy Clerk

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APPENDIX C

APPEALS COURT ORDER OF MARCH 29, 1994:

United States Court of Appeals for the First Circuit

No. 93-1873

A. G. Edwards Jr., plaintiff, appellant

v.

First American Title Insurance Company, et al, Defendants, Appellees.

JUDGMENT

Entered March 29, 1994

This Cause came on to be submitted on the briefs and original record on appeal from the United States District Court for the District of New Hampshire.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

Francis P. Scigliano

Clerk

Relevant excerpt from this Judgment:

In his reply brief, Edwards has belatedly challenged this accrual date. However, his only challenge, whether as a matter of Massachusetts, New Hampshire or Nevada law, is his contention that his causes of action did not accrue until

mid-1990, when the U. S. Forest Service allegedly canceled his grazing permit for livestock on his Saval Ranches. He alleges that this cancellation "[d]irectly deriv[ed]" from the defective foreclosure sale and caused him substantial economic harm.

This argument has no merit because there has been, and can be, no dispute that Edwards was on notice of possible substantial injury as of the August 1985 foreclosure sale, when the underinclusive property description may have caused the Saval Ranches to be sold for a lower price. A cause of action accrues when a plaintiff has "knowledge, actual or attributed, of both harm to it and the likely cause of such harm. . . sufficient to stimulate further inquiry which was likely to alert it to a cause of action against a defendant." Hanson Housing

Authority v Dryvit System, inc., 29 Mass. App. Ct. 440, 446, 560 N.E. 1290, 1294 (1990), rev. den., 409 Mass. 1101, 565 N.E.2d 792 (1991). The fact that a plaintiff subsequently suffers some additional harm that may be traced to the same likely cause does not delay accrual of the cause of action. Id. ("It is not required that the extent of the injury be known before accrual of a cause of action"); Rowe v. John Deere, 130 N.H. 18, 21-23, 533 A.2d 375, 376-78 (1987). See Sorenson v. Pavlikowski, 94 Nev. 440, 443-44, 581 P.2d 871, 853-54 (1978).

Accordingly, with an accrual date of no later than August 15, 1985, the latest Edwards could have brought any of his claims against any of the defendants was August 15, 1991. Edwards' amended complaint naming these eight defendants was not filed until June 2, 1992."

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APPENDIX D

District Court Order of March 23, 1993:

United States District Court for the

District of New Hampshire

A. G. Edwards Jr.

v.

First American Title Co., et al.

Civ. No. 91-346-JD

Summary

The Court enters the following orders.

On Motion to Dismiss of Defendants Harold Pearson III, William Gordon, John G. McElwee, Stephen Brown, Thomas L. McKiernan and Arthur Duncan (document no. 17): Motion granted to the extent that the case is dismissed against these defendants.

On Prince A. Hawkins' Motion to Dismiss or Transfer (document no. 15): Motion granted to the extent that the

case is dismissed against Hawkins and Hawkins, Rhodes & Sharp.

On Motion to Dismiss or Transfer Venue of Defendant John Hancock Mutual Life Insurance Company (document no. 16): Motion granted to the extent that the case is dismissed against John Hancock.

On First American Title Insurance Company's Motion in the alternative to Dismiss or Transfer for lack of Proper Venue (document no. 9): Motion granted to the extent that the case against First American is transferred to the United States District Court for the District of Nevada.

SO ORDERED.

s/Joseph A. DeClerico Jr.
Joseph A. DeClerico Jr.
Acting Chief Judge

March 23, 1993

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APPENDIX E

District Court Order of July 8, 1993:

Summary

The Court grants the Defendants Prince Hawkins and Hawkins, Rhodes & Sharpe's Motion for Entry of Final Judgment Pursuant to F.R.Civ.P. 54(b) (document no. 35). The Court grants the Motion for Entry of Final Judgment Pursuant to Federal Rule of Civil Procedure 54(b) (document no. 37).

SO ORDERED:

s/Joseph A. DeClerico Jr.
Joseph A. DeClerico Jr.
Chief Judge

July 8, 1993

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APPENDIX F

District Court Order of July 9 1993:

United States District Court for the

District of New Hampshire

Edwards

v.

First American Title, et al,

JUDGMENT

Judgment is entered only as to Defendants John Hancock Mutual Life Insurance Company, Harold Pearson III, William Gordon, John G. McElwee, Stephen Brown, Thomas L. McKiernan, Arthur Duncan, Prince Hawkins and Hawkins, Rhodes & Sharp pursuant to the Order dated July 8, 1993, by Chief Judge Joseph A. DeClerico Jr. (signed by Clerk James R. Starr)

By the Court

s/James R. Starr, Clerk

Date: July 9, 1993

Civil Action No. 1:91-cv-00346-JD

No. 93-2099

In The

Supreme Court of the United States

October Term, 1994

A.G. EDWARDS, JR.,

Petitioner,

vs.

FIRST AMERICAN TITLE INSURANCE COMPANY and JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION FOR RESPONDENT PRINCE HAWKINS, INDIVIDUALLY AND ON BEHALF OF THE LAW FIRM OF HAWKINS, RHODES & SHARP

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the First Circuit Court of Appeals properly upheld the dismissal by the federal district court for the District of New Hampshire of all claims against Prince A. Hawkins, a Nevada attorney, and the Nevada law firm of Hawkins, Rhodes & Sharp, where the statute of limitations applicable to each claim had expired prior to the commencement of the action?

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Appendix H — Motion to Dismiss of Defendants Harold Pearson, III, William Gordon, John G. McElwee, Steven Brown, Thomas L. McKiernan and Arthur Duncan . . . 60a

STATEMENT OF THE CASE

On August 12, 1991, petitioner A.G. Edwards, Jr. ("Edwards") filed a complaint against First American Title Company of Nevada in the federal district court for the District of New Hampshire, complaining of a foreclosure which occurred in Nevada on August 15, 1985. Respondents' Joint Appendix ("App.") at 32a.[1] On October 2, 1992, he filed his First Amended Complaint, changing the defendant from First American Title Company of Nevada to First American Title Company. App. at 37a. The First Amended Complaint added additional defendants, John Hancock Mutual Life Insurance Company ("John Hancock"), various officers and employees of John Hancock, and respondents Prince A. Hawkins and Hawkins, Rhodes and Sharp (collectively referred to as "Hawkins"), alleged by Edwards to be Nevada counsel for John Hancock, and added additional claims for relief. App. 00a. The First Amended Complaint was served upon Hawkins on December 10, 1992 in Reno, Nevada. *Id.*

On December 28, 1992, Hawkins moved for dismissal of the action pursuant to F. R. Civ. P. 12(b)(2) for lack of personal jurisdiction; for dismissal of the action pursuant to F. R. Civ. P. 12(b)(6) for failure to state a claim as Edwards' claims against Hawkins were barred by the statute of limitations; for dismissal of the action on the ground of improper venue under 28 U.S.C. § 1391(a) and (b) and 28 U.S.C. § 1406(a); or, in the alternative, to transfer the action to Nevada pursuant to 28 U.S.C. § 1404(a). App. 54a.

On March 23, 1993, the district court (DiClerico, C.J.) granted Hawkins' motion to dismiss on the ground that the district court lacked personal jurisdiction over all of the non-corporate

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1. Edwards did not submit a separate appendix with his petition; accordingly, respondents have submitted a joint appendix.

defendants, including Hawkins, and dismissed the action against John Hancock on the basis that Edwards had previously filed an action in the federal district of Massachusetts against Hancock. App. 19a. The action against First American was transferred to Nevada. *Id.*

In a *per curiam* opinion, the First Circuit Court of Appeals upheld the dismissal of the individual defendants on the ground of personal jurisdiction, upheld the dismissal of John Hancock on the ground of comity, and affirmed the transfer of the action against First American Title Insurance Co. to Nevada pursuant to 28 U.S.C. § 1404(a). App. 1a. The First Circuit rejected Edwards' contention that the federal court erred in not transferring the claims against the individual defendants to a forum which would have personal jurisdiction on the ground that statutes of limitations applicable to Edwards' claims had expired prior to his filing of these claims.

SUMMARY OF ARGUMENT

The sole argument advanced by Edwards in his Petition is that the First Circuit erred in determining that each of his claims against the individual defendants accrued on August 15, 1985, and therefore, the action was barred against the individual defendants, on any of Edwards' theories, on August 15, 1991, nearly a year prior to the filing of Edwards' Amended Complaint against the individual defendants. Edwards' argument is predicated on his claim that a subsequent loss of income in 1990 purportedly arising from the original foreclosure in 1985 "advanced" the accrual date.

REASONS FOR DENYING THE WRIT

I.

A SUBSEQUENT INJURY ALLEGED TO HAVE ARISEN FROM THE SAME CAUSE DOES NOT TOLL THE ACCRUAL OF THE CAUSE OF ACTION.

In his original Amended Complaint, Edwards claimed that he had been injured as a result of an allegedly defective foreclosure of cattle ranches owned by the Saval Ranching Co. ("Saval"), which secured loans from John Hancock to Saval, which occurred on August 15, 1985. Based upon these allegations, the federal district court correctly declined Edwards' invitation to transfer the action against the individual defendants to a forum which would arguably have personal jurisdiction over them pursuant to 28 U.S.C. § 1404(a) or under 28 U.S.C. § 1631 on the ground that all of his claims against the individual defendants were time-barred, whether New Hampshire, Massachusetts or Nevada law applied.

Although Edwards originally acknowledged that each of his claims against the individual defendants accrued on August 15, 1985, he belatedly asserted in a reply brief filed in the First Circuit that when the United States Forest Service cancelled a grazing permit for Saval's ranches, he was further injured. This subsequent economic loss, which Edwards asserted was "directly derived" from the allegedly defective foreclosure sale, is, according to Edwards, grounds for delaying the accrual date of his civil claims until mid-1990.

The First Circuit Court of Appeals correctly determined that regardless of whether Massachusetts, Nevada or New Hampshire law is applied, Edwards' claims accrued no later than August 15, 1985:

> This argument has no merit because there has been, and can be, no dispute that Edwards was on notice of possible substantial injury as of the August 1985 foreclosure sale, when the under inclusive property description may have caused the Saval ranches to be sold for a lower price. A cause of action accrues when a plaintiff has "knowledge, actual or attributed, of both harm to it and the likely cause of such harm, . . . sufficient to stimulate further inquiry which was likely to alert it to a cause of action against a defendant." *Hanson Housing Authority v. Dryvit System, Inc.*, 29 Mass. App. Ct. 440, 446, 560 N.E. 2d 1290, 1294 (1990), *rev. den.*, 409 Mass. 1101, 565 N.E. 2d 792 (1991). The fact that a plaintiff subsequently suffers some additional harm that may be traced to the same likely cause does not delay accrual of the cause of action. *Id.* ("It is not required that the extent of injury be known before accrual of a cause of action"); *Rowe v. John Deere*, 130 N.H. 18, 21-23, 533 A.2d 375, 376-78 (1987). *See Sorenson v. Pavlikowski*, 94 Nev. 440, 443-44, 581 P.2d 851, 853-54 (1978).

In his Petition for Certiorari, Edwards cites no law to the contrary. There is no legal or factual basis for further review of the First Circuit Court of Appeals' decision.

CONCLUSION

For all the foregoing reasons, Prince A. Hawkins and Hawkins, Rhodes & Sharp respectfully request this Honorable Court to deny the Petition for Certiorari.

Respectfully submitted,

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Dated: July 26, 1994

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED MARCH 29, 1994

[NOT FOR PUBLICATION]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1873

A. GREER EDWARDS, JR.,

Plaintiff, Appellant,

v.

FIRST AMERICAN TITLE INSURANCE COMPANY OF NEVADA, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Joseph A. DiClerico, U.S. District Judge]

Before

Breyer, *Chief Judge*,
Selya and Cyr, *Circuit Judges*.

Appendix A

A.G. Edwards, Jr. on the brief pro se. *Richard B. Couser* and *Orr and Reno, P.A.* on brief for appellees First American Title Insurance Company, John Hancock Mutual Life Insurance Company, Harold Pearson III, William Gordon, John G. McElwee, Stephen Brown, Thomas L. McKiernan and Arthur Duncan.

Martha V. Gordon and *Nelson, Kinder, Mosseau & Gordon, PC* on brief for appellees Prince A. Hawkins and Hawkins, Rhodes & Sharp.

March 29, 1994

Per Curiam. Plaintiff-appellant A.G. Edwards, Jr., has brought a pro se appeal from the district court's judgment dismissing Edwards' claims against nine defendants: the John Hancock Mutual Life Insurance Co. ("John Hancock"), six John Hancock employees, Nevada attorney Prince Hawkins, and the Nevada law firm of Hawkins, Rhodes & Sharp. Edwards also appeals from the district court's ruling transferring Edwards' claims against the remaining defendant, the First American Title Insurance Co. ("First American"), to the District of Nevada on grounds of convenience under 28 U.S.C. § 1404(a).

In the 1970's the Saval Ranching Co. ("Saval"), of which Edwards was part owner and later sole owner, borrowed money from John Hancock. As security, Saval gave John Hancock deeds of trust to two commercial cattle ranches in Nevada owned by Saval. In 1985, at a time when Edwards resided in Massachusetts, John Hancock foreclosed on Saval's ranches. John Hancock foreclosed through First American, which was John Hancock's trustee on the deeds of trust to Saval's ranches. Hawkins and his law firm represented John Hancock in the foreclosure proceedings.

Appendix A

The deeds of trust to Saval's ranches expressly included the mineral, oil, and gas rights pertaining to those ranches. In preparing for the foreclosure sale, however, First American excluded these mineral, oil and gas rights from the published description of the properties to be sold. Although he could not bid on the properties, Edwards attended the August 15, 1985 Nevada foreclosure sale. At that sale the United States government purchased the properties and acquired the release of John Hancock's interest in the properties. Edwards subsequently moved from Massachusetts to New Hampshire.

The U.S. then filed suit against Edwards in the federal district court in Nevada to recover a $600,000 deficiency. The Nevada court ruled on January 5, 1988 that First American had violated applicable Nevada foreclosure statutes by excepting the mineral, oil, and gas rights from the description of the properties, and invalidated the foreclosure. In 1989, Edwards and the U.S. entered into a settlement agreement by which the U.S. transferred all its interest in the properties to Edwards in return for a sum of money.

On January 25,1991, Edwards filed suit in the District Court for the District of Massachusetts against John Hancock. The suit, which included claims for negligence and for breach of contract, sought damages for the underinclusive property description in the notices of the foreclosure sale of the Saval ranches. The district court dismissed Edwards' negligence claim as time-barred, and dismissed his contract claim on the merits. On September 4, 1992, this court affirmed the dismissal of the negligence claim, vacated the dismissal of the contract claim, and remanded for further proceedings. *Edwards v. John Hancock Mutual Life Ins. Co.*, 973 F.2d 1027 (1st Cir. 1992).

Edwards filed the instant pro se lawsuit on August 12, 1991 in

the District Court for the District of New Hampshire. His original complaint named only first American and sought damages for First American's alleged negligence and breach of contract in carrying out the foreclosure sale. On June 2, 1992, Edwards filed an amended pro se complaint in which he added the other nine defendants and also added additional grounds for relief.

On March 23, 1993, the district court (1) dismissed Edwards' claims against the eight non-corporate defendants for lack of personal jurisdiction in New Hampshire; (2) dismissed Edwards' claims against John Hancock in light of Edwards' pre-existing suit against John Hancock in the District of Massachusetts; and (3) transferred Edwards' claims against First American to the District of Nevada pursuant to 28 U.S.C. § 1404(a). Edwards appeals, having been issued a Fed. R. Civ. P. 54(b) certificate by the district court.

Claims Against the Eight Non-Corporate Defendants

The district court dismissed Edwards' claims against the eight non-corporate defendants — i.e., the six John Hancock employees (Pearson, Gordon, McElwee, Brown, McKiernan, and Duncan), Nevada attorney Hawkins, and Hawkins' law firm — on the ground that New Hampshire lacked personal jurisdiction over any of them under the New Hampshire long-arm statute, N.H. Rev. Stat. Ann. § 510:4.

Although Edwards appears to concede in his brief on appeal that New Hampshire lacked personal jurisdiction over these eight defendants, in his reply brief he insists that he did not mean to waive that issue. Assuming, arguendo, that the issue is properly before us, we would affirm the district court's ruling on this point for the reasons stated in the district court's March 23, 1993 order.

Appendix A

Edwards did not adequately allege that any of these non-corporate defendants — as distinguished from their corporate employer or principal, John Hancock — transacted business, owned property, or committed a tortious act in New Hampshire within the meaning of the New Hampshire long-arm statute, N.H. Rev. Stat. Ann. 510:4. There is no dispute that the alleged tort —underinclusive description of Saval's properties in connection with the 1985 foreclosure sale — occurred in Nevada and that Edwards resided in Massachusetts at that time. Since this is not a continuing tort, the fact that Edwards moved to New Hampshire after the foreclosure sale does not mean that the alleged tort occurred, in part, in New Hampshire.

Edwards argues that instead of dismissing these claims, the district court should have transferred the claims to another forum which would have personal jurisdiction over these eight non-corporate defendants. The district court did not deal with this point in its opinion.

Edwards bases his argument on 28 U.S.C. § 1631, which provides that whenever a "court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action . . . to any other such court in which the action . . . could have been brought at the time it was filed." There is no question in this case that the district court had jurisdiction over the subject-matter of this action; it was personal jurisdiction that was lacking. Some courts and commentators, relying on a construction of the legislative history of § 1631, have suggested that a court may transfer an action under § 1631 only when it lacks subject-matter jurisdiction, *not* personal jurisdiction. *See, e.g., Levy v. Pyramid Co. of Ithaca*, 687 F. Supp. 48, 51 (N.D.N.Y. 1988), *aff'd*, 871 F.2d 9 (2nd Cir. 1989); 15 Wright, Miller, & Cooper, Federal Practice and Procedure § 3842, at 323 (2nd ed. 1986). By contrast, other

courts — pointing to the language of § 1631 itself, which speaks of "jurisdiction" and makes no further distinction —have held that § 1631 does permit a transfer where the transferor court lacks personal jurisdiction. *See, e.g., Ross v. Colorado Outward Bound School, Inc.*, 822 F.2d 1524,1527 (10th Cir. 1987); *United States v. American River Transportation, Inc.*, 150 F.R.D. 587 (C.D. Ill. 1993). This court has yet to rule on the issue.

We need not do so here. Regardless of whether transfer is sought under § 1631, under 28 U.S.C. § 1404(a) (which provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought"), or under 28 U.S.C. § 1406(a) (which provides that "[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought"), we would affirm the denial of a transfer because all of Edwards' claims against the eight non-corporate defendants were time-barred, under all statutes of limitations that might be applicable, at the time he filed those claims in the instant case. A federal court may not transfer an action to another court under § 1631 if the action was time-barred at the time it was filed. *See, e.g., Billops v. Department of the Air Force*, 725 F.2d 1160, 1163 (8th Cir. 1984). Similarly, transfer under either § 1404(a) or § 1406(a) would not serve the interests of justice where the action was time-barred at the time it was filed. *See, e.g., McTyre v. Broward General Medical Center*, 749 F. Supp. 102, 105-09 (D.N.J. 1990).

Edwards asserted six causes of action against some or all of these eight defendants: (1) negligence; (2) breach of contract; (3) breach of an implied covenant of good faith and fair dealing: (4)

violation of RICO, 18 U.S.C. §§ 1961-68; (5) violation of the Massachusetts Consumer Protection Act, Mass. Gen. Laws 93A; and (6) deceptive trade practices under Nevada statutes. In Edwards' prior appeal arising out of the similar action Edwards brought in Massachusetts, this court has already ruled that Edwards' cause of action for negligence was time-barred under Massachusetts law at some time before January 1991, i.e., before Edwards filed either the complaint or the amended complaint in the instant action. *Edwards, supra*, 973 F.2d at 1029-30.

All other possible statutes of limitations for any of Edwards' claims — whether under Nevada, Massachusetts, or New Hampshire law — are six years or less. The applicable limitations period for a negligence action is six years in New Hampshire, N.H. Rev. Stat. Ann. 508:4, I, and four years in Nevada, Nev. Rev. Stat. § 11.190, 2(c). The applicable limitations period for a contract action, or an action for breach of an implied covenant of good faith, is six years in Massachusetts, Mass. Gen. Laws c. 260, § 2; six years in New Hampshire, N.H. Rev. Stat. Ann. 508:4, I; and either six or four years in Nevada, Nev. Rev. Stat. § 11.190, 1(b), 2(c). The limitations period for a civil RICO action is four years. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S.143, 156 (1987). The limitations period for an action under Mass. Gen. Laws c. 93A is four years. Mass. Gen. Laws c. 260, § 5A. Finally, Edwards has not disputed appellees' assertion that the limitations period for an action under Nevada deceptive trade practices statutes is four years. Nev. Rev. Stat. §§ 598A. 220, 11.220.

This court already has strongly suggested, if not expressly held, that under Massachusetts law Edwards' cause of action for negligence accrued by the time of the foreclosure sale, i.e., by August 15, 1985. *Edwards, supra*, 973 F.2d at 1029-30. Appellees urge that this accrual date should govern all of Edwards' causes of action.

Appendix A

Edwards has given no reason, and we see none, to think that his contract-based claims and his tort-based claims should be governed by different accrual dates. In his brief on appeal, moreover, Edwards expressly accepted the August 15, 1985 accrual date.

In his reply brief, Edwards does belatedly challenge this accrual date. However, his only challenge, whether as a matter of Massachusetts, New Hampshire, or Nevada law, is his contention that his causes of action did not accrue until mid-1990, when the U.S. Forest Service allegedly cancelled his grazing permit for livestock on his Saval ranches. He alleges that this cancellation "[d]irectly deriv[ed]" from the defective foreclosure sale and caused him substantial economic harm.

This argument has no merit because there has been, and can be, no dispute that Edwards was on notice of possible substantial injury as of the August 1985 foreclosure sale, when the underinclusive property description may have caused the Saval ranches to be sold for a lower price. A cause of action accrues when a plaintiff has "knowledge, actual or attributed, of both harm to it and the likely cause of such harm, . . . sufficient to stimulate further inquiry which was likely to alert it to a cause of action against a defendant." *Hanson Housing Authority v. Dryvit System, Inc.*, 29 Mass. App. Ct., 440, 446, 560 N.E.2d 1290, 1294 (1990), *rev. den.*, 409 Mass. 1101, 565 N.E.2d 792 (1991). The fact that a plaintiff subsequently suffers some additional harm that may be traced to the same likely cause does not delay accrual of the cause of action. *Id.* ("It is not required that the extent of injury be known before accrual of a cause of action"); *Rowe v. John Deere*, 130 N.H. 18, 21-23, 533 A.2d 375, 376-78 (1987). *See Sorenson v. Pavlikowski*, 94 Nev. 440, 443-44, 581 P.2d 851, 853-54 (1978).

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Accordingly, with an accrual date of no later than August 15, 1985, the latest Edwards could have brought any of his claims against any of these defendants was August 15, 1991. Edwards' amended complaint naming these eight defendants was not filed until June 2, 1992.

Although Edwards' original complaint was filed three days before August 15,1993, it did not name any of these defendants. Edwards has not argued that the provisions of Fed. R. Civ. P. 15(c) — setting forth the circumstances under which claims raised in an amended complaint can relate back to the time the original complaint was filed — apply here. Even if he had raised this argument — we note that both appellees' briefs do discuss this point, despite Edwards' failure to raise it — we see no merit in it.

Fed R. Civ. P. 15(c)(1) permits relation back when "relation back is permitted by the law that provides the statute of limitations applicable to the action." None of the statutes of limitations which may possibly apply to any of Edwards' claims contains such a provision.

Fed. R. Civ. 15(c)(2) permits relation back when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." This provision governs the assertion of new legal theories in an amended complaint, and does not apply when the amended complaint seeks to add new parties. *See Jacobson v. McIlwain,* 145 F.R.D. 595, 603 (S.D. Fla. 1992).

Finally, Fed. R. Civ. P. 15(c)(3) permits relation back of an amendment adding new parties when the claim asserted arose out of the conduct set forth in the original pleading, as required by Rule 15(c)(2), "and, within the period [120 days] provided by Rule 4(j)

for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party." Edwards meets neither of these latter two requirements here.

Edwards has said nothing to indicate that any of the eight non-corporate defendants named in the amended complaint received notice of the original complaint within 120 days of its filing. Nor is there anything in the record to suggest that Edwards made some mistake regarding the proper party to be sued, rather than merely deciding at a later time to sue further parties in addition to First American. Indeed, Edwards himself acknowledged as much in his memorandum in support of his motion to file the amended complaint, when he stated, "The plaintiff has further studied his cause of Action in this matter and has found the justification to enlarge his Complaint by adding relevant supplementary averments and by naming related additional appropriate Defendants."

Edwards argues in his brief on appeal that after he filed his original complaint, and also after he filed his amended complaint, the clerk of the district court improperly delayed issuing a summons as required by Fed. R. Civ. P 4(a). This impropriety, according to Edwards, delayed service of process upon the defendants.

We need not consider this matter because Edwards' contention, even if true, is irrelevant to our decision. All of Edward's claims against the eight non-corporate defendants were time-barred before June 2, 1992 when the amended complaint

naming these defendants was filed. Any subsequent delay in service of process on these defendants, therefore, was beside the point. Even if somehow the district court clerk improperly prevented Edwards from providing these defendants with timely notice of his original complaint and those circumstances somehow satisfied Fed. R. Civ. P 15(c)(3))A) (points which are by no means clear), this would avail Edwards nothing, since we have already held that Fed. R. Civ. P. 15(c)(3)(B) was not satisfied.

Claims Against John Hancock

As we have said, on January 25, 1991 — well over a year before the filing of his amended complaint in the instant case adding claims against John Hancock — Edwards filed a similar suit in the District Court for the District of Massachusetts, naming John Hancock as the only defendant. Edwards' Massachusetts lawsuit, like the instant suit, sought to recover damages, based on counts of negligence and breach of contract, for the uinderinclusive property description in the notices of the foreclosure sale of the Saval ranches.

The district court found that both the Massachusetts lawsuit and Edwards' instant claims against John Hancock involved the same issues and the same parties. Accordingly, the district court dismissed Edwards' claims against John Hancock, citing the "generally recognized doctrine of federal comity which permits a district court to decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another district." *Pacesetter Systems, Inc. v. Medtronic, Inc.*, 678 F.2d 93, 94-95 (9th Cir. 1982). At the time of the district court's order, apparently Edwards' Contract claim remained pending in the Massachusetts suit, although his negligence claim had been dismissed as time barred." *See Edwards, supra*, 973 F.2d 1027.

Edwards does not appear to challenge this district court ruling in his brief on appeal. In light of "the settled appellate rule that issues . . . unaccompanied by some effort at developed argumentation . . . are deemed waived," *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.), *cert. denied*, 494 U.S. 1082 (1990), we will not consider this issue.

Claims Against First American

This court lacks appellate jurisdiction to consider Edwards' appeal from the district court's ruling transferring Edwards' claims against defendant-appellant First American Title Insurance Co. to the District of Nevada pursuant to 28 U.S.C. § 1404(a). It is well-settled that such a transfer order under § 1404(a) is an interlocutory order and therefore is not appealable as a final judgment. *Codex Corp. Milgo Electronic Corp.*, 553 F.2d 735, 737 (1st Cir.), *cer. denied*, 434 U.S. 860 (1977). Since Edwards has not obtained a certificate for interlocutory appeal under 28 U.S.C. § 1292(b), we lack jurisdiction over this aspect of his appeal.

In any event, even if we had jurisdiction, we would affirm the district court's transfer ruling for the reasons stated in the district court's March 23, 1993 order. Only under unusual circumstances would we disturb a district court's exercise of discretion in ordering a transfer under § 1404(a). *Id.* Certainly no such circumstances exist here, given the undisputed facts that the events giving rise to Edwards' claims occurred primarily in Nevada, the Saval ranches are in Nevada, and relevant documents and witnesses will be readily available in Nevada.

Appendix A

Conclusion

We affirm the district court's denial of Edwards' motion for reconsideration. As the district court stated, if viewed as a Fed. R. Civ. P. 59(e) motion to alter or amend the judgment, the motion was untimely because it was served more than ten days after entry of judgment. Fed. R. Civ. P. 59(e). If viewed as a Fed. R. Civ. P. 60(b) motion, the motion stated no possible basis for relief from judgment.

We have considered all of Edwards' other arguments and find them meritless.

The request of Hawkins and Hawkins, Rhodes & Sharp that sanctions, including attorneys' fees, be awarded against Edwards is *denied*.

The judgment of the district court is *affirmed*.

APPENDIX B — JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE DATED JULY 9, 1993

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Civil Action No. 1:91-cv-00346-JD

Edwards

v.

First American Title, et al.

JUDGMENT

JUDGMENT is entered only as to Defendants John Hancock Mutual Life Insurance Company, Harold Pearson, III, William Gordon, John G. McElwee, Steven Brown, Thomas L. McKiernan, Arthur Duncan, Prince Hawkins and Hawkins, Rhodes & Sharpe pursuant to the Order dated July 8, 1993, by Chief Judge Joseph A. DiClerico, Jr. (Signed by Clerk James R. Starr)

By the Court,
s/ James R. Starr
Clerk

Date: July 9, 1993

cc: A. Greer Edwards, Jr.,
James E. Morris, Esq.
Richard B. Couser, Esq.
Martha V. Gordon, Esq.

Appendix B

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Civil No. 91-349-JD

A.G. Edwards. Jr.

v.

First American Title Co.. et al.

ORDER

Defendants Prince Hawkins ("Hawkins"); Hawkins, Rhodes & Sharpe ("HR&S"); John Hancock Mutual Life Insurance Company ("John Hancock"); Harold Pearson, III; William Gordon; John G. McElwee; Steven Brown; Thomas L. McRiernan; and Arthur Duncan (the "individual defendants") move for entry of final judgment pursuant to Fed. R. Civ. P. 54(b). The plaintiff A.G. Edwards, Jr. ("Edwards") has filed a written objection to Hawkins and HR&S' motion, asking the court instead to certify its March 23, 1993 order for interlocutory appeal pursuant to 28 U.S.C.A. § 1292 (West Supp. 1993). Although the time has not yet run for Edwards to respond to John Hancock and the individual defendants' motion, the court assumes Edwards objects to entry of final judgment as to John Hancock and the individual defendants for the same reasons already expressed in his written objection to Hawkins and HR&S' motion. In the event the court is in error in making this assumption, Edwards may file his written objection by July 27, 1993 for consideration by the court.

Rule 54(b) states "[w]hen multiple parties are involved, the court may direct the entry of a final judgment as to one or more but

fewer than all of the ... parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." The policy of Rule 54(b) is "to permit district courts to determine that parties should, in certain circumstances, be exempted from the burden of awaiting the final outcome of a multi-party . . . case." *Willhauck v. Halpin*, 953 F.2d 689, 701 (lst Cir. 1991). Despite the policy underlying Rule 54(b), "there is a long-settled and prudential policy against the scattershot disposition of litigation." *Spiegel v. Trustees of Tufts College*, 843 F.2d 38, 42 (lst Cir. 1988). The court should not routinely enter judgment under Rule 54(b) and should not enter judgment as an accommodation to lawyers or litigants. *Consolidated Rail Corp. v. Fore River Ry. Co.*, 861 F.2d 322, 325 (lst Cir. 1988); *Spiegel*, 843 F.2d at 42 (citing *Santa Maria v. Owens-Illinois Inc.*, 808 F.2d 848, 954 (lst Cir. 1986); *Panichella v. Pennsylvania R.R. Co.*, 252 F.2d 452, 455 (3d Cir. 1958)).

To enter judgment pursuant to Rule 54(b), the court must make an express direction for the entry of judgment in a separate document and a corresponding entry must be made in the court's docket. *Willhauck*, 953 F.2d at 701. The court also must make an express determination there is no just reason for delay. *Id.* In determining whether there is just reason for delay, the court considers factors including the relationship between the adjudicated and unadjudicated claims, the possibility the need for review might be mooted by future developments, the equities between the parties, the possibility the reviewing court may be obligated to consider the same issues a second time, preventing delay and preventing unnecessary expense. *See Spiegel*, 843 F.2d at 43 n.3 (adopting factors set forth in *Allis-Chalmers Corp. v. Philadelphia Elec. Co.*, 521 F.2d 360, 364 (3d Cir. 1975)); *C.R. Bard, Inc. v. Medical Elec. Corp.*, 529 F. Supp. 1382, 1388 (D. Mass. 1982) (citing *Curtiss-Wright Corp. v. General Elec. Co.*, 446

U.S. 1 (1980)). The decision whether to enter final judgment rests largely in the discretion of the trial court. *Curtiss-Wright,* 446 U.S. at 8; *C.R. Bard,* 529 F. Supp. at 1388.

In this case, the court has dismissed all claims against Hawkins, HR&S, John Hancock and the individual defendants. The remaining unadjudicated claims are against another defendant and venue in that matter has been transferred to the District of Nevada. "An order that disposes finally of a claim against one party to the suit can be certified for an immediate appeal under the rule even if identical claims remain pending between the remaining parties." *National Metalcrafters v. McNeil,* 784 F.2d 817, 821 (7th Cir. 1986).

If the court does not enter final judgment as to Hawkins, HR&S, John Hancock and the individual defendants at this time, Edwards must wait until the case against the remaining defendant in the District of Nevada is resolved to appeal their dismissal. If Edwards then succeeds in his appeal, the district court would have to consider the merits of his claims against them. Considering the claims against them after the district court in Nevada has resolved the claims against the remaining defendant would waste judicial resources because the claims arise from the same facts. By contrast, if the court enters final judgment as to Hawkins, HR&S, John Hancock and the individual defendants at this time, Edwards may immediately appeal the portion of the court's order dismissing them pursuant to 28 U.S.C.A. § 1291 (West Supp. 1993). If the appellate court finds the district court erred in dismissing them, the district court may be able to consolidate Edwards's claims against them with the case against the remaining defendant in the District of Nevada. The court therefore finds entering final judgment as to Hawkins, HR&S, John Hancock and the individual defendants at this time may promote judicial economy.

Appendix B

In addition, since the court dismissed Hawkins, HR&S and the individual defendants for lack of personal jurisdiction and dismissed John Hancock based on the first-filed rule, rather than dismissing them based on the merits of Edwards's claims, allowing appeal of that dismissal at this time will not require an appellate court to review the same issues twice if the case against the remaining defendant is appealed. And finally, Hawkins and HR&S state that withholding final judgment will require them to incur expenses monitoring the remaining case. Taking all of the foregoing factors into consideration, the court finds there is no just reason for delaying entry of final judgment as to Hawkins, HR&S, John Hancock and the individual defendants and directs the entry of final judgment as to them.

Summary

The court grants the Defendants Prince Hawkins and Hawkins, Rhodes & Sharpe's Motion for Entry of Final Judgment Pursuant to F.R.Civ.P. 54(b) (document no. 35). The court grants the Motion for Entry of Final Judgment Pursuant to Federal Rule of Civil Procedure 54(b) (document no. 37).

SO ORDERED.

/s/ Joseph A. DiClerico, Jr.
Joseph A. DiClerico, Jr.
Chief Judge

July 8, 1993

cc: A. Greer Edwards, pro se
Richard B. Couser, Esquire
Martha V. Gordon, Esquire

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE FILED MARCH 23, 1993

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Civ. No. 91-346-JD

A. G. Edwards. Jr.

v.

First American Title Co.. et al.

ORDER

Plaintiff A.G. Edwards, Jr. ("Edwards") has sued defendants First American Title Insurance Company ("First American"); John Hancock Mutual Life Insurance Company ("John Hancock"); Prince Hawkins ("Hawkins"); Hawkins, Rhodes & Sharp ("HR&S"); and Harold Pearson, III; William Gordon; John G. McElwee; Steven Brown; Thomas L. McKiernan and Arthur Duncan (collectively, the "individual Hancock defendants"). The court considers defendants' motions to dismiss or to transfer venue from the District of New Hampshire.

Background

The present action was commenced on August 12, 1991 when Edwards filed a complaint against First American. On October 2, 1992, Edwards filed an amended complaint ("Complaint") naming the other nine defendants. The Complaint identifies the individual Hancock defendants as "salaried senior officials" of John Hancock. Complaint ¶¶ 5, 6.

Appendix C

The Complaint alleges the following facts. In 1973, Edwards and two other persons organized a partnership, Saval Ranching Company ("Saval"), to purchase and operate two commercial cattle ranches in Nevada. Edwards operated Saval's business from his residence in Massachusetts through 1988 and afterwards from his residence in New Hampshire. In 1975-76, Saval borrowed approximately $1,500,000 from John Hancock, secured by deeds of trust on the ranches. The deeds of trust were executed by Saval, John Hancock, and First American as John Hancock's trustee. Subsequently, the United States Department of Agriculture loaned money to Saval, secured by deeds of trust on the same ranches. In 1983, Saval defaulted on the notes to John Hancock. In 1985, Edwards became the sole owner of Saval. Also in 1985, John Hancock, through the individual Hancock defendants and First American, foreclosed on the ranches. Hawkins and HR&S acted as legal counsel for John Hancock in connection with the foreclosure proceedings.

The deeds of trust securing John Hancock's loans expressly included the mineral, gas and oil rights of the properties. However, First American excepted the mineral, gas and oil rights from the published description of the properties used in connection with the foreclosure proceedings. Edwards attended the foreclosure sale but was not allowed to bid on the properties. The United States purchased the properties at the foreclosure sale for $1,231,915.60 and acquired the release of John Hancock's interest in the properties. The United States brought suit against Edwards in the United States District Court for the District of Nevada to recover a $600,000 deficiency. On January 5, 1988, the Nevada court ruled that First American had violated Nevada's foreclosure statutes by excepting the mineral, gas and oil rights from the published description of the properties, and invalidated the foreclosure. In 1989, the United States and Edwards entered into a settlement

agreement pursuant to which Edwards paid a sum of money to the United States and the United States transferred to Edwards all its interest in the properties.

In this action, Edwards seeks damages for the defendants' alleged improper conduct in carrying out the foreclosure sale. The Complaint states that the foreclosure was conducted negligently and in breach of the defendants' "express and implied warranties of good faith and adherence to prevaillng law." Complaint ¶ 67.

Discussion

I. Motions of Individual Hancock Defendants, Hawkins and HR&S to Dismiss

The individual Hancock defendants, Hawkins and HR&S (collectively, the "non-corporate defendants") have moved to dismiss the action against them for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2). The plaintiff has the burden of demonstrating facts sufficient to establish personal jurisdiction over the defendants. *See United Elec., Radio and Machine Workers v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1090 (lst Cir. 1992), *rev'd on other grounds*, No. 92-1865, 1993 U.S. App. LEXIS 3452 (lst Cir. Mar. 3, 1993); *Concord Labs, Inc. v. Ballard Medical Prods.*, 701 F. Supp. 272, 274 (D.N.H. 1988); *Velcro Group Corp. v. Billarant*, 692 F. Supp. 1443, 1446 (D.N.H. 1988). In determining whether the plaintiff has met this burden, the court takes properly pleaded facts as true and construes all reasonable inferences in favor of the plaintiff. *Velcro Group*, 692 F. Supp. at 1446. The court must construe a pro se complaint liberally. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). In reviewing this matter the court has also considered and construed liberally all of plaintiff's responses and affidavits filed in opposition to the pending motions.

Appendix C

New Hampshire's long-arm statute specifies when a nonresident defendant is subject to personal jurisdiction in New Hampshire. N.H. Rev. Stat. Ann. § 510:4 (1983). The statute provides

> [a]ny person who is not an inhabitant of this state and who, in person or through an agent, transacts any business within this state, commits a tortious act within the state, or has the ownership, use, or possession of any real or personal property situated in this state submits himself, or his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from or growing out of the acts enumerated above.

Id. If the court finds the defendants are subject to jurisdiction under the long-arm statute, the court must analyze whether the assertion of jurisdiction is consistent with the due process requirement of the United States Constitution. *Buckley v. McGraw-Hill Inc.*, 762 F. Supp. 430, 436 (D.N.H. 1991).

Edwards argues the non-corporate defendants are subject to personal jurisdiction under § 510:4 because they transact business in New Hampshire through their "agents" and clients, John Hancock and First American. This argument, however, rests upon a misinterpretation of agency law. The non-corporate defendants were agents of John Hancock and not vice versa. Personal jurisdiction over employees is independent of personal jurisdiction over their employers. *See Velcro Group*, 692 F. Supp. at 1449; *Lex Computer & Management Corp. v. Eslinger & Pelton, P.C.*, 676 F. Supp. 399, 405 (D.N.H. 1987). Edwards, in his Complaint and in his responses to defendants' motions, offers only bald assertions

that First American or John Hancock were acting as agents of the non-corporate defendants while transacting business in New Hampshire. Furthermore, the noncorporate defendants deny transacting business in New Hampshire and submitted affidavits in support of their position. The court finds Edwards has failed to meet his burden of showing that, as to this cause of action, the non-corporate defendants are subject to personal jurisdiction under New Hampshire's long-arm statute because they transact business in New Hampshire.

Edwards further asserts the non-corporate defendants are subject to personal jurisdiction under § 510:4 because they have committed torts causing injury within New Hampshire. The noncorporate defendants deny they have committed torts within New Hampshire. New Hampshire courts interpret § 510:4 to grant jurisdiction over a non-resident defendant " 'when the impact in New Hampshire of the deendant's out-of-state conduct has allegedly resulted in a New Hampshire tort and was more than fortuitous, so that the defendant knew or should have known his conduct could injure a person here.' " *Concord Labs.*, 701 F. Supp. at 275 (quoting *Lex Computer*, 676 F. Supp. at 403); *see also Velcro Group*, 692 F. Supp. at 1447. For example, in cases alleging ongoing harm to businesses, courts have held that the defendants' out-of-state conduct resulted in a New Hampshire tort when the plaintiffs' principal place of business was located in New Hampshire. *Velcro Group*, 692 F. Supp. at 1447 (quoting *Lex Computer*, 676 F. Supp. at 403); *cf. Buckley*, 762 F. Supp. at 43839 (in defamation case, defendant's out-of-state publication found to be a New Hampshire tort because plaintiff resides in New Hampshire). "Since the brunt of the harm would be felt in New Hampshire at the plaintiff's principal place of business, jurisdiction is proper in 'New Hampshire based on the "effects" of the defendants [sic] out-of-state conduct.' " *Concord Labs.*, 701 F.

Supp. at 276 (quoting *Lex Computer*, 676 F. Supp. at 404) (internal citation omitted). These cases are based on New Hampshire's interest in exercising jurisdiction over those who commit torts within its boundaries. *Id.* (citing *Keeton v. Hustler Magazine Inc.*, 465 U.S. 770 (1984); *Estabrook v. Wetmore*, 129 N.H. 520 (1987)); *see also Tavoularis v. Womer*, 123 N.H. 423, 425-26 (1983).[1]

In this case, Edwards argues the effects of the tort are felt in New Hampshire because he is currently a New Hampshire resident and now conducts his business from New Hampshire. However, the court finds that Edwards' relocation to New Hampshire does not alter the fact that the tort, if any, occurred in 1985 in Nevada, when Edwards was a resident of Massachusetts. The mere fact that after the tort occurred Edwards relocated to New Hampshire does not give rise to personal jurisdiction in the District of New Hampshire when the tort alleged is not of an ongoing nature. The court finds Edwards has failed to allege sufficient facts in his complaint, responses and affidavits to demonstrate that the non-corporate defendants are subject to personal jurisdiction under § 510:4 because they have committed torts within New Hampshire.

Because the court lacks personal jurisdiction over the *non*corporate defendants, their motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(2) are granted. In view of the venue analysis which follows in the discussion of Edwards' claims against First American, the court notes that even if the court had personal jurisdiction over the non-corporate defendants, the District of New Hampshire is an inappropriate venue for this action.

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1. Edwards' citation to *Tavoularis* is inapposite. In *Tavoularis*, New Hampshire exercised personal jurisdiction over a defendant who negligently entrusted an automobile to another person, who injured the plaintiff in an accident in New Hampshire. 123 N.H. at 424-25. The injury in *Tavoularis* took place in New Hampshire. *Id.* In this case, the actual injury occurred in Nevada.

Appendix C

II. John Hancock's Motion to Dismiss

John Hancock does not challenge personal jurisdiction or venue in the District of New Hampshire. John Hancock argues the case against it should be dismissed because Edwards has already commenced an action against John Hancock in the District of Massachusetts and because Edwards' claims against John Hancock are barred by the doctrine of res judicata. In the alternative, John Hancock argues the court should transfer venue to the District of Nevada.[2] Edwards requests that if the court decides to transfer the case, the court consolidate it with a case pending in the District of Massachusetts, *Edwards v. John Hancock Mutual Life Insurance Co.*, No. 91-10237-K (D. Mass.).

The court considers whether this action should be dismissed due to the existence of the Massachusetts lawsuit. "There is a generally recognized doctrine of federal comity which permits a district court to decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another district." *Pacesetter Sys., Inc. v. Medtronic Inc.*, 678 F.2d 93, 94-95 (9th Cir. 1982); *see also Frigorifico Caparra, Inc. v. J. Fleishman & Co.*, 58 F.R.D. 199, 200 (D.P.R. 1972). Although the "first-filed" rule should not be applied mechanically, normally "the court which first acauired jurisdiction should try the lawsuit and no purpose would be served by proceeding with a second action." *Pacesetter*, 678 F.2d at 95; *cf. Gemco Latinoamerica, Inc. v. Seiko Time Corp.*, 623 F. Supp. 912, 916 (D.P.R. 1985) (the forum where an action is first filed is given priority over subsequent actions in venue analysis). Considerations of judicial administration, comity, avoiding

2. In view of the court's decision on John Hancock's motion to dismiss due to the pending action in the District of Massachusetts, the court need not address John Hancock's alternative argument.

duplicative litigation and avoiding conflicting determinations weigh in favor of dismissing the later-filed action when the first-filed forum is capable of efficiently resolving the issues. *See West Gulf Maritime Ass'n v. ILA Deep* Sea Local 24, 751 F.2d 721, 729 (5th Cir.), *cert. denied*, 474 U.S. 844 (1985); *Pacesetter*, 678 F.2d at 96; *Gemco*, 623 F. Supp. at 916.

The Massachusetts lawsuit was filed on January 25, 1991 and the New Hampshire lawsuit was filed on August 12, 1991. Edwards asserts that the Massachusetts case is dissimilar from the New Hampshire case, although he admits that the issues in the cases overlap slightly. John Hancock argues the lawsuits challenge the same actions and submits an affidavit from Edward S. Rooney, Jr., an attorney representing John Hancock in the Massachusetts action, in support of this contention. John Hancock also provided the court with a copy of the court file in the Massachusetts lawsuit.

In the Massachusetts lawsuit, John Hancock is the only defendant. Edwards alleges misconduct by John Hancock in connection with the foreclosure sale and the excepting of the mineral, gas and oil rights on the same properties at issue in this case. The court finds that the Massachusetts and the New Hampshire lawsuits involve the same issues and the same parties. In view of the court's obligation to preserve judicial resources and the fact that the Massachusetts lawsuit was filed prior to the instant lawsuit, the court dismisses the instant action. Edwards' claims concerning John Hancock's conduct in connection with the 1985 foreclosure sale can be adjudicated in the lawsuit pending in the District of Massachusetts.

III. First American's Motion to Dismiss

First American does not challenge personal jurisdiction in the

District of New Hampshire. First American asks the court to dismiss the case for improper venue pursuant to 28 U.S.C.A. § 1391(b) (West Supp. 1992) or, in the alternative, to transfer the case to the District of Nevada.

The court considers whether venue properly lies in the District of New Hampshire. The Complaint alleges diversity jurisdiction pursuant to 28 U.S.C.A. § 1332(a) (West Supp. 1992). Complaint ¶ 7. The Complaint also raises a federal question by alleging violations of 18 U.S.C.A. § 1961-68 (West 1984 & Supp. 1992). Complaint ¶ 9. The district in which a case not grounded solely on diversity may be brought is governed by 28 U.S.C.A. § 1391(b), which states

> [a] civil action wherein jurisdiction is not founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

Section 1391(c) provides that "[f]or purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced." As noted above, First American was subject to personal jurisdiction in New

Hampshire at the time the action was commenced. At this point in time First American is the only remaining defendant in the case and therefore venue is proper in the District of New Hampshire pursuant to § 1391(b)(1).[3]

When venue is found to be proper, the court may transfer an action to another district pursuant to 28 U.S.C.A. § 1404(a) (West Supp. 1992). "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." *Id.* The court notes that the case could originally have been brought in the District of Nevada because a substantial part of the events or omissions giving rise to the claim occurred in Nevada and the property that is the subject of the action is located in Nevada. *See* 28 U.S.C.A. § 1391(b)(2).

The court next analyzes whether the interest of justice requires transferring the case against First American to the District of Nevada. The First Circuit Court of Appeals has noted that "the convenience of the parties and witnesses, the order in which jurisdiction was obtained by the district court, the availability of documents, and the possibilities of consolidation" are factors for the district court to consider in determining whether to transfer a case. *Cianbro Corp. v. Curran-Lavoie, Inc.*, 814 F.2d 7, 11 (1st Cir. 1987) (citing 28 U.S.C. § 1404(a); *Codex Corp. v. Milgo Elec.*

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3. The court notes that, if venue were to be determined as of the time the Complaint was filed, venue would be improper in the District of New Hampshire under § 1391(b)(1) because all the defendants did not reside in the same state. In that case, the court could transfer the action to the District of Nevada pursuant to 28 U.S.C.A. § 1406(a) (West 1976) if transfer were "in the interest of justice." For the reasons stated herein, the court finds the "interest of justice" analysis under § 1406(a) very similar to the "interest of justice" analysis under § 1404(a) (West Supp. 1992) as far as the facts of this case are concerned.

Corp., 553 F.2d 735, 737 (1st Cir.), *cert. denied*, 434 U.S. 860 (1977)); *see also Wellons v. Numerica Sav. Bank*, 749 F. Supp. 336, 337 (D. Mass. 1990) (citing *Cianbro*, 814 F.2d at 11). The court may also consider whether the law of the forum state will govern the action. *See Wellons*, 749 F. Supp. at 337. A defendant seeking to transfer an action has the burden of showing that these factors weigh in favor of transfer. *Buckley*, 762 F. Supp. at 439. "The Supreme Court has held that '[u]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.' " *Id.* (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)).

The convenience of the witnesses is the single most important factor for the court to consider when deciding whether to transfer an action. *Id.* at 440. In this case, Edwards challenges events surrounding foreclosure-proceedings of property located in Nevada. Because the sale occurred in Nevada, it is reasonable to conclude that the witnesses involved in the sale are also in Nevada.[4] Similarly, the documents pertaining to the foreclosure sale and the land will be readily available in Nevada. The law of Nevada and possibly of Massachusetts, but not the law of New Hampshire, will apply in the case. On the other hand, the court notes that Edwards resides in New Hampshire and First American is a California corporation with at least one office in New Hampshire.

The court finds that First American has met its burden of showing that the interest of justice and the convenience of the witnesses and parties weigh strongly enough in its favor to justify transferring the suit to the District of Nevada pursuant to § 1404(a).

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4. Hawkins and HR&S have submitted an affidavit stating that the expected witnesses are in Nevada.

Appendix C

Summary

The court enters the following orders.

On Motion to Dismiss of Defendants Harold Pearson, III, William Gordon, John G. McElwee, Steven Brown, Thomas L. McKiernan and Arthur Duncan (document no. 17): Motion granted to the extent that the case is dismissed against these defendants.

On Prince A. Hawkins' Motion to Dismiss or Transfer (document no. 15): Motion granted to the extent that the case is dismissed against Hawkins and Hawkins, Rhodes & Sharp.

On Motion to Dismiss or Transfer Venue of Defendant John Hancock Mutual Life Insurance Company (document no. 16): Motion granted to the extent that the case is dismissed against John Hancock.

On First American Title Insurance Company's Motion in the Alternative to Dismiss or Transfer for Lack of Proper Venue (document no. 9): Motion granted to the extent that the case against First American is transferred to the United States District Court for the District of Nevada.

SO ORDERED.

s/ Joseph A. DiClerico, Jr.
Joseph A. DiClerico, Jr.
Acting Chief Judge

March 23, 1993

Appendix C

cc: A. Greer Edwards, Jr., pro se
Richard B. Couser, Esquire
Martha V. Gordon, Esquire

APPENDIX D — PLAINTIFF'S COMPLAINT

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

C.A. #

A. GREER EDWARDS, JR.

Plaintiff

vs.

FIRST AMERICAN TITLE COMPANY OF NEVADA,

Defendant

COMPLAINT

COUNT I

1. The plaintiff, A. Greer Edwards, Jr., is a resident of the state of New Hampshire;

2. The defendant, First American Title Company of Nevada, is a Nevada corporation with its principal place of business in Nevada;

3. In 1973 the plaintiff had organized, together with two other persons, a Nevada partnership, the Saval Ranching Company, for the purpose of acquiring and operating two ranches: the Saval and Haystack;

4. The plaintiff is the only remaining party in interest;

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5. In 1975 and 1976 respectively, the partnership had borrowed approximately 1 million dollars from the John Hancock Mutual Life Insurance Company, a Massachusetts corporation, as evidenced by two promissory notes secured by two *first* deeds of trust;

6. The deeds of trust were executed by the borrowers, on the one hand and the lender and defendant title company, on the other; *Exh 2(a) and 2(b)*;

7. Thereafter, the United States of America, through the Farmers Home Administration, extended to the partnership several loans. These were secured by two *second* trust deeds on the same real estate;

8. In 1983, due to an epidemic cattle disease outbreak, drought conditions and a general nation-wide decline in cattle and agricultural values, the borrowers became delinquent in their payments to Hancock, the lender;

9. In July of 1985 the defendant, First American Title Company of Nevada, started foreclosure proceedings of the plaintiff's real estate;

10. The deeds of trust securing Hancock's loans expressly included the mineral, oil and gas rights in the description of the properties. *Exh. 2(a)*, par. 13 and *Exh. 2(b)*, par. 3;

11. Notwithstanding, the defendant title company, in breach of its duty to the plaintiff, expressly "excepted" the mineral, gas and oil rights in the statutory description of the properties being foreclosed, in its Notice of Sale;

Appendix D

12. The Nevada statutes require that properties being foreclosed be *Particularly* described, N.R.S. 21.140(c) 2;

13. Not only did the defendant title company "except" the mineral, oil and gas rights expressly included in the description of the properties in the *first* deeds of trust. It also aggravated the "exception" by adding to it the following ambiguous language: "said rights forming no part of the guarantee", *Exh. 1*;

14. At all pertinent times and at present, pit gold mining in northern and eastern Nevada had made Nevada the leading gold producing state in the United States. The United States District Court for the District of Nevada duly took judicial notice of this fact (Please see *The United States of America Vs. A. Greer Edwards, Jr.* et al, Civil R-86-199 BRT, *Exh. 1*);

15. The Freeport- McMoran Gold Company, the largest gold mining company in North America, had at all pertinent times conducted operations immediately adjacent to the plaintiff's property, the Saval ranch. The company had expressed great interest in the acquisition of the plaintiff's ranches, at various times;

16. As a result of the "exception", accompanied as it was by the ambiguous language, senior officials of the Freeport-McMoran Gold Company were present at the foreclosure auction, but declined to bid;

17. The United States of America, holder of the *second* trust deeds, was the only bidder at the sale and acquired the properties, as a single parcel, for the amount of $1,231,925.60;

18. The United States of America paid Hancock approximately

$1,250.000.- for the release of its interest and proceeded to bring action against the plaintlff to recover a deficiency in the District Court of Nevada;

19. On January 5, 1988 the District Court for the District of Nevada ruled that the Notice of foreclosure violated the Nevada foreclosure statutes and that the "exception" of the mineral, oil and gas rights from the description of the properties in the Notice of sale substantially prejudiced the plaintiff, Edwards. *Exh. 1*;

20. Subsequently the United States of America and the plaintiff, Edwards, reached a settlement agreement, finalized in 1989, by which, in consideration of $400,000.- , the United States agreed to transfer the properties it had acquired at the auction sale to the plaintiff, Edwards; Payment was made and the properties were so re-transferred.

As a proximate result of the defendant title company's grossly negligent actions and breach of duty owed the plaintiff, the plaintiff not only lost the participation at the foreclosure sale of viable interested bidder, the Freeport-McMoran Gold Company, but sustained a variety of provable consequential damages in the amount of at least three million dollars.

WHEREFORE the plaintiff requests that judgment be entered in his favor against the defendant title company, in the amount of three million dollars.

COUNT II

The plaintiff, A. Greer Edwards, Jr., re-avers and realleges par. 1 to 20 inclusive and further alleges as follows:

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21. The defendant title company, the First American Title Company of Nevada, undertook and promised the borrowers that in the event of foreclosure, it would conform to the requirements of the law. *Exh. 2(a) par. 8*;

22. The Nevada statutes require that properties being foreclosed be particularly described, N.R.S. 21.140 (c) 2. Thus by excepting the mineral, gas and oil rights from the description in its Notice of sale, the defendant title company breached its undertaking to conform to the requirements of law and the implied warranty to conduct the foreclosure sale in good faith.

As a proximate result of the defendant title company's breach of its express promise and implied warranty of good faith plaintiff not only lost the participation at the foreclosure sale of a viable interested bidder, but sustained a variety of other provable consequential damages in the amount of at least three million dollars.

WHEREFORE the plaintiff requests that judgment be entered in his favor against the defendant title company, in the amount of three milllon dollars.

JURY DEMAND

The plaintiff demands trial by jury on all issues so triable.

APPENDIX E — PLAINTIFF'S FIRST AMENDED COMPLAINT

A. G. Edwards Jr.
Rural Route # 1, Box 208
Bennington Battle Trail
Wilton Center, New Hampshire 03086
Telephone 617-566-2480

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

CA No. 91-346-S

A. G. Edwards Jr.,

plaintiff

v.

First American Title Company
Head Office, 114 E. 5th St., Santa Ana, Calif. 92701

John Hancock Mutual Life Insurance Company
John Hancock Place, Boston, Mass. 02115,

Prince Hawkins, Attorney,
Hawkins, Rhodes and Sharp, Attorneys,
Post Office Box 750, Reno, Nevada 89504,

Harold Pearson III, Agricultural Loan Officer,
William Gordon, Vice-President
John G. McElwee, Chairman Emeritus,
Steven Brown, Chairman
John Hancock Mutual Life Insurance Co.,
John Hancock Place, Boston, Mass. 02115,

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Thomas L. McKiernan, Agricultural Investment
Officer, John Hancock Mutual Life Insurance Co.
South 179 Stevens Street, Spokane, Washington 99204,

Arthur Duncan, Agricultural Investment Officer,
John Hancock Mutual Life Insurance Company
Post Office Box 1087, Twin Falls, Idaho 83301,

Defendants

PLAINTIFF'S FIRST AMENDED COMPLAINT

COUNT I

1. The plaintiff, A. G. Edwards Jr., is a citizen of the State of New Hampshire.

2. Defendant First American Title Company (Title Company) is a California corporation, doing Title and related business in majority of the United States including New Hampshire.

3. The John Hancock Mutual Life Insurance Company (Hancock) is a Massachusetts corporation which, among other business activities, has financed agricultural acquisitions and agribusiness operations throughout the United States and elsewhere, and does extensive business of several types within the State of New Hampshire.

4. Defendant Attorney Prince Hawkins and the Defendant Law Firm of Hawkins, Rhodes and Sharp of Reno, Nevada, at all times pertinent served as a Western legal representative and legal agent for and legal consultant to Defendant John Hancock Mutual Life Insurance Company of Massachusetts, conducting various legal business at the direction of Defendant Hancock.

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5. Defendants Harold Pearson III, William Gordon, John G. McElwee and Steven Brown during all times pertinent were salaried senior officials of Defendant Hancock, based at Boston, Massachusetts.

6. Defendants Thomas L. McKiernan of Spokane, Washington and Arthur Duncan of Twin Falls, Idaho, at all times pertinent served as Agricultural Investment Officers salaried by the Defendant Hancock.

7. This Action is brought under U.S.C. 28 Section 1332.

8. This Action is brought for damages which exceed $50,000.00.

9. This Action is brought as well under 18 U.S.C. Sections 1961 – 1968, whereunder plaintiff has been damaged in his business by the wrongful behavior of Defendants in no less than two instances over a ten year period, which instances of wrongful commercial behavior by Defendants utilized mail and wire transmittals.

10. This Action is brought as well citing applicable Massachusetts General Laws 93-A pertaining to Consumer Protection specifics as they relate to the business activities of Massachusetts based corporations and to the official actions, sanctioned or not sanctioned, of salaried officials and paid agents of these specific Massachusetts corporations when conducting business relationships with Massachusetts based business entities including plaintiff.

11. This Action is brought as well under Nevada Revised Statutes 41.600 and 598.410, 598.411, 598.412, 598.413 and

598.490 pertaining to Deceptive Trade Practices, which State and which Statutes relate to the situs of the real estate in question and to the locus of the subsequently described wrongful foreclosure and forced sale carried out by the Defendants.

12. This Action is brought as well as an Action upon a Contract.

13. In 1973, the plaintiff had organized with two other persons a partnership entitled Saval Ranching Company (Saval), for the purpose of acquiring and operating two commercial cattle ranches, the Saval Ranch and the Haystack Ranch.

14. Effective 1974 and subsequently at all times pertinent, New Hampshire and Massachusetts have served as the operating headquarters and the locus of all decision making and all policy control of all Saval agribusiness and related activities.

15. The plaintiff became the only remaining party in interest commencing 1985, continuing to do business to the present as Saval Ranching Company.

16. In 1975 and 1976, respectively, Saval had borrowed approximately one and one-half million dollars from Defendant Hancock's Agricultural Loan sub-section, as evidenced by two promissory notes secured by individual and separate First Deeds of Trust upon, respectively, the Saval Ranch and the Haystack Ranch.

17. These two Deeds of Trust were each executed by the Saval borrowers on the one hand, and by both the Lender Hancock and by the Defendant Title Company (Hancock's Trustee) on the other.

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18. Thereafter, United States of America through its Department of Agriculture/Farmers Home Administration extended operating loans to the Saval partnership, secured by individual Second Deeds of Trust upon the same two separate parcels of ranch real estate.

19. In 1983, due to an area-wide epidemic cattle disease, due also to severe prolonged regional drouth conditions and resulting from a precipitous national decline in both agricultural land and cattle valuations, the borrowers unavoidably became delinquent in their payments to Defendant Hancock, the lender.

20. Hancock, together with its relevant officers, Defendants Pearson, Gordon, Brown, McElwee, McKiernan and Duncan and others (Defendants Pearson et al) in 1984 and subsequently analyzed the status of all Hancock's many outstanding and overdue agribusiness loans. These named parties recognized that recent severely adverse national agribusiness circumstances as described above had vastly undermined the financial integrity of substantial of Hancock's agricultural borrowers, many of whom had become unavoidably delinquent in their scheduled repayments to Hancock.

21. Taking cognizence of this widespread delinquent status and the advanced financial vulnerability of most of their agricultural borrowers nation-wide, Hancock and Defendants Pearson et al (Pearson, Gordon, Brown, McElwee, McKiernan, Duncan and others) found it essential circa 1984 that Hancock adopt contrived stratagems to obfuscate and to disguise the seriously arrears status of much of Hancock's agribusiness lending. These named parties, by information and belief, sought to create for public and for insurance regulatory perception the facade that Hancock's agricultural loan activities remained overall sound, stable and in current status.

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22. In numbers of instances where pledged borrower collateral securing Hancock's delinquent agricultural loans had declined to valuations seriously below the face-amount loan balances remaining due to Hancock, Defendants Hancock/Pearson et al, by information and belief, contrived this artifice: Defendants Hancock/Pearson et al would extend maximal forbearance to those delinquent borrowers with negative net worth and in many instances would even extend to such borrowers further substantial loan amounts, in order to maintain those seriously delinquent borrowers financially afloat, avoiding thereby the costly and embarrassing alternative that a Hancock foreclosure would recover only a percentage of total amounts owing.

23. By information and belief, Hancock thus established the policy to prop up its most financially vulnerable borrowers with patience and, as necessary, with additional Hancock loan proceeds, and Hancock thus would studiously avoid foreclosing on each pledged agricultural property where forced sale of the collateral would net Hancock less than its outstanding loan balance and costs. This practice of extending forbearance and additional loan amounts, and of avoiding foreclosure, while courting possible disaster for the lender Hancock, would disguise to outsiders Hancock's financial vulnerability and Hancock's precariously overextended agribusiness loan portfolio.

24. However, Defendants Pearson et al determined a simultaneous and much more assertive parallel policy whereby, in those occasional circumstances where a delinquent Hancock borrower still retained loan collateral sufficient to cover Hancock's total outstanding loan balance, Defendants would selectively and discriminatively foreclose at once on such adequately secured borrower. This artifice would assure that each foreclosure Hancock did execute would net for Hancock the full

and entire amount Hancock claimed as due, including all additionals of penalties, collection costs, Hancock Attorney fees and escalated interest. And Hancock would contrive thereby a more solid financial image presented to insurance regulators and to the public, by recovering in those hand-picked foreclosure instances the full amounts due Hancock from each foreclosed borrower.

25. By Defendants' calculated policy of predatory selective discriminatory foreclosure only upon borrowers who had sufficient loan collateral remaining, Hancock could disguise to regulators and the public the aggrieved state of Hancock's many under-collateralized delinquent agribusiness loans.

26. Adopting such predatory and discriminatory selective foreclosure policy against the plaintiff, despite assurances given at personal meetings and conversations between plaintiff and each of the named Defendants, Hancock/Pearson et al determined immediately to foreclose upon Saval's two loans and promptly to fire-sale all of plaintiff's agricultural property for amounts certain at least to be sufficient to pay all overstated totals which Hancock alleged as due from plaintiff.

27. First American Title Company, Hancock's Trustee, accordingly commenced formal foreclosure proceedings against plaintiff's entire agricultural real estate for the benefit of the lender Hancock.

28. The formally drawn First Deeds of Trust which secured Hancock's two Saval loans expressly from their inception had included all the mineral, gas and oil rights within the legal descriptions of these pledged properties.

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29. Notwithstanding, the Defendant Title Company, in breach of its undertaking and its duty owed to plaintiff, chose expressly to "except" the mineral, gas and oil rights when it compiled the statutory published descriptions of the properties being foreclosed, and when the Title Company advertised and circulated its statutorily required Official Notice of Sale.

30. Statutes of the State of Nevada where these ranches were located and wherein they were subjected to foreclosure sale require that the specific properties being foreclosed be particularly described, (N.R.S. 21.140(c) 2.), which the Defendant Title Company failed to do.

31. Not only did the Defendant Title Company "except" the mineral, gas and oil rights although expressly included within the legal property descriptions of the First Deeds of Trust. It also aggravated the situation further by adding to the published and advertised Official Notice of Sale this ambigious language relating to the minerals, oil and gas deposits: "Said rights forming no part of this guarantee".

32. At all times pertinent and at present, surface gold mining in northern and eastern Nevada had made Nevada the leading gold producing area in the Western Hemisphere. United States Court for the District of Nevada duly took judicial notice of this fact within the Matter: The United States of America v. A. G. Edwards Jr., et al, Civil R-86-199 BRT.

33. The Freeport-McMoran Gold Company, the largest gold mining company in North America, had at all pertinent times conducted its operations immediately adjacent to plaintiff's property, the Saval Ranch. The Company at various times had expressed great interest in its acquisition of the plaintiff's ranches.

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34. As a direct result of the Defendant Title Company's "exception", accompanied as it was by this ambigious language in its advertised Notice of Sale, highest officials of Freeport-McMoran Gold Company attended the Saval foreclosure and auction sale but declined to bid, being uncertain from the muddled phraseology of the Official Notice of Sale what their bid might actually purchase. The Defendant Title Company had taken no steps whatever to clarify the situation and to assure that the foreclosure and auction of plaintiff's properties might at least be presented to prospective buyers in a reasonably clear and lucid context.

35. Defendants Pearson et al, Hancock, Attorney Hawkins/ Law Firm of Hawkins, Rhodes and Sharp, all intimately connected with the foreclosure proceedings and making their maximal efforts to ramrod these proceedings along, did not bestir themselves to correct severe defects within the Official Notice of Sale which rendered the foreclosure indelibly biased against and damaging to the plaintiff.

36. Thus, the Defendants each have violated the covenant of good faith and fair dealing implicit in all contractual undertakings. Particularly had the Defendant Title Company promised the plaintiff mortgagor within the specific phraseology of the applicable Deeds of Trust that, in the event of foreclosure, the Title Company would make its notices of sale conform to the requirements of the law and to the Deeds of Trusts' own covenants. This the Defendant Title Company totally failed to do.

37. Meantime, the plaintiff was shocked to discover that Pearson et al/Hancock for then obscure reasons were working behind the scenes to undermine and destroy plaintiff's advantageous commercial relationships and credibility with

plaintiff's crucial Western-based business and major governmental agencies — parties who for years had satisfactorily and with mutual benefit provided vital financing and agricultural services required for the successful operation of plaintiff's two ranches.

38. Pearson et al/Hancock improperly approached plaintiff's various major financial and governmental business associates and imparted highly unfavorable, often inaccurate, confidence-violating statements and divulgences about plaintiff. Pearson et al/ Hancock improperly and unfavorably alleged private and restricted business information regarding plaintiff and in various ways were able seriously to prejudice these vital associates and agencies against the plaintiff. The resulting adverse cumulative business effect wrought upon plaintiff by the improper subversions of Pearson et al/Hancock were devastating to the plaintiff, who had no knowledge of Defendants' damaging performance until the harmful effect had been accomplished by them.

39. Pearson et al/Hancock by their improper representations so agitated and distressed plaintiff's cattle herd financing agency, Production Credit Association, that this large financial entity at once called plaintiff's long-standing yet quite solid and secure million dollar cattle loan and credit line, called and terminated after Hancock related agitation with no advance notice whatever. Susbequently, the agitation produced by Pearson/Hancock caused plaintiff's various business associates to exhibit unwarranted but advanced apprehensive and distrustful behavior toward plaintiff, despite years of prior satisfactory relationships enjoyed by plaintiff with these colleagues.

40. The intemperate and improper representations made by Pearson et al/ Hancock led plaintiff's cattle financing agency even

to believe that plaintiff was secretely withdrawing collateralized livestock from his ranch and selling these clandestinely at unaccredited distant cattle markets while pocketing the proceeds and depriving the cattle lender of his rightful revenues. No such event ever occurred or was even contemplated, and plaintiff had no financial need to indulge in any such activity.

41. When plaintiff then found it imperative to confront Hancock and Pearson et al, Gordon and McElwee with the facts of their improper conduct to damage plaintiff's advantageous business relationships with others, Hancock/Pearson et al and others falsely denied and forswore their knowingly illegal and improper behavior—then immediately subjected plaintiff to further punitive treatment as the means to chastise him for having been so forthright as to call public attention to Pearson et al/ Hancock mischief.

42. Recognizing the certainty and the seriousness of the impending and scheduled Hancock foreclosure of his total ranch properties, plaintiff urgently sought a favorable sale of his entire ranches, immediate proceeds of which sale would then promptly and fully pay all obligations due to all lenders and as well might then allow plaintiff some modest remaining amount deriving from plaintiff's earlier costly improvements to upgrade these properties.

43. Through extensive efforts, the plaintiff identified a motivated Colorado-based buyer, and detailed negotiations went forward with this party. The complex nature of plaintiff's ranch holdings caused these sale negotiations to occupy appreciable time. With the scheduled Hancock foreclosure now only a few short weeks away, plaintiff asked his western attorney to contact Hancock/Pearson et al and respectfully to request that the scheduled ranch foreclosure be delayed by one month, time

sufficient for the Colorado purchaser to complete the transaction and for plaintiff to receive from this buyer sufficient sale proceeds immediately to pay all Hancock and other obligations fully.

44. Under great compulsion to buttress their damaged account books with any and all loan foreclosures which could totally cover each entire Hancock obligation, Pearson/Hancock et al summarily refused the plaintiff his requested one-month delay in the foreclosure action, although such brief thirty-day delay would have facilitated Hancock's total pay-out by the plaintiff.

45. Resultantly, Pearson et al/Hancock were able to paper over the precarious agitated status of much of their agricultural lending by their performing such precipitous and predatory selectively discriminating foreclosures upon loan properties of plaintiff and of others similarly situated, wherein Hancock each time recovered all monies due under these specific loans, and thereby, receiving payment in full, contrived to exhibit a sounder lender status than actually existed.

46. As Defendants Pearson et al well knew would occur, Hancock's forced sale receipts from their foreclosure upon plaintiff's two ranches did indeed completely cover all outstanding amounts due Defendant Hancock.

47. Plaintiff attended the Title Company's foreclosure sale and auction of his ranches, and applied formally to Defendant Title Company Official Rav Peterson to be admitted to the sale as an accredited bidder on plaintiff's own ranch properties. The Defendant Title Company summarily refused to allow or to honor any bid by plaintiff upon his own properties being forcibly sold. Consequently, plaintiff was totally powerless to prevent a devastating fire-sale of his valuable ranch assets.

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48. United States of America, holder of both Second Deeds of Trust from plaintiff, then emerged as the only bidder at the foreclosure sale, and acquired the two properties as a single parcel for the distress amount of only $ 1,231,915.60.

49. United States of America then paid Hancock its total amount allegedly due, some $ 1,150,000.00, and in return acquired the release of Hancock's entire interest in both ranch properties.

50. Hancock, fully paid, marked plaintiff's notes as satisfied in full, but has refused to return these cancelled and fully satisfied documents to the plaintiff.

51. Among the foreclosure papers then summarily handed to plaintiff by foreclosing authorities Hancock/Title Company was an astonishing bill covering several brief hours of Hancock-related legal services, allegedly carried out by Hancock's Western Attorney Prince Hawkins of the Defendant Law Firm Hawkins, Rhodes and Sharp. The plaintiff was shocked to discover that Defendants Hawkins' charge to plaintiff for less than one half day of Hawkins' Hancock related legal time approached $ 26,000.00. This startling professional charge entered against plaintiff was automatically paid to Defendants Hawkins, Rhodes and Sharp by Defendant Hancock, paid out of surplus ranch foreclosure proceeds ordinarily due to plaintiff, an event over which plaintiff was unable to exercise any direct influence or control.

52. Although severely distraught at the improper, unethical and predatory performances of each of the above Defendants, plaintiff immediately sought the help of his Western Attorney in at least having the vastly inflated Hawkins, Rhodes and Sharp legal charge ameliorated downward to some more reasonable and correct figure.

Appendix E

53. Plaintiff's own Western Counsel proved totally ineffective and could procure from Defendants Hawkins et al no gesture whatever toward adjustment, nor even some justification for the inordinate Hawkins et al charge, doubtlessly resulting from the closeness and cohesiveness maintained among themselves by most of the practicing attorneys within this sparsely populated state.

54. Following the foreclosure sale, the plaintiff was ordered immediately to vacate his entire ranches, forcing him to resort to a further fire-sale of his entire ranch cattle herd, his extensive agricultural equipment and machinery, his inventories of supplies and parts, his fuel and materials, all precipitously dispersed under the most unfavorable and damaging economic conditions, in addition to the enormous theft and slippage which were unavoidably sustained in connection therewith.

55. Just under one year later, the United States sought to recover a perceived deficiency amount still allegedly due the second lien holder, to which this applicant under the law found was not a valid obligation.

56. As direct result of its shoddy management practices and its failure suitably to maintain the ranch improvements over which it had control for some three years' time, the United States during its tenure of the two ranches and by its imprudent renting practices caused the entire ranch improvements and terrain to deteriorate greatly, the total cattle grazing capacity to become vastly reduced and the entire premises to reach an advanced impoverished state.

57. On January 5, 1988, United States District Court for the District of Nevada ruled that Defendant Title Company's original Notice of Foreclosure had violated the State's foreclosure statutes, and that the "exception" of the mineral, oil and gas rights from the

advertised Legal Description in the Notice of Sale of the Properties had materially prejudiced the plaintiff.

58. United States District Court accordingly reversed and invalidated the entire foreclosure sale because of glaring improprieties wrongfully committed by the Defendant Title Company et al, all further complicating the plaintiff's position, upon whom the ranches were again thrust, now in their much impoverished condition and having greatly reduced cattle carrying capacity and therefore vastly curtailed income generating capability.

59. Subsequently, United States of America and the plaintiff reached a full settlement and release agreement in 1989, by which, upon plaintiff's very large cash payment to U. S. A., the United States agreed to transfer back to plaintiff all its interest in the properties which it had supposedly acquired at the 1985 foreclosure sale of plaintiff's ranch assets.

60. As a proximate result of Defendant Title Company et al having conducted grossly negligent actions and breaches of duty owed to the plaintiff, the plaintiff not only lost the participation at the foreclosure sale of a viable interested buyer, Freeport-McMoran Gold Company; plaintiff was improperly barred by Title Company officials from participating in the auction which might have avoided the distress-sale price brought at the forced sale of his ranch properties; and plaintiff as well sustained a variety of additional provable consequential damages in the amount of no less than five million dollars.

61. WHEREFORE, the plaintiff requests that judgment be entered in his favor against each of the Defendants including First American Title Company, John Hancock Mutual Life Insurance

Company, Defendants Hawkins, Rhodes and Sharp and Attorney Prince Hawkins, as well against Defendants Pearson, Gordon, Brown, McElwee, McKiernan and Duncan, in the amount of seven million dollars, plus treble damages, plus plaintiff's attorney and court costs and all appropriate interest, plus other damages which the Court may deem proper, as provided by applicable statute.

COUNT II

62. The plaintiff A. G. Edwards Jr. reavers and re-alleges Paragraphs 1. through 61., inclusive, and further avers as follows:

63. The Defendant First American Title Company undertook and promised the borrower that, in the event of foreclosure, it would conform to the requirements of the law.

64. The Nevada Revised Statutes require that properties being foreclosed be particularly described, (N.R.S. 21.140 (c) 2). Thus, by excepting the mineral, oil and gas rights from the property description and specifics in its Official Notice of Sale, the Defendant Title Company et al breached its undertaking to conform to the requirements of the law and breached as well their implied warranty to conduct the foreclosure sale in good faith.

65. Attorney Prince Hawkins and the Defendant Law Firm of Hawkins, Rhodes and Sharp, despite their proximity to the foreclosure events and their responsibility to supervise all legal aspects of the forced sale proceedings, equivalently failed their responsibility to assure that the undertaking conformed to requirements of the law, and themselves breached their implied warranty to assure that the foreclosure and sale were conducted in good faith.

Appendix E

66. Defendants Pearson, Gordon, Brown, McElwee, McKiernan and Duncan failed their own responsibilities, to assure that the foreclosure undertaking conformed to the requirements of law, and these specified Defendants breached their implied warranties to assure that the foreclosure and sale were conducted in good faith.

67. As a proximate result of the deficiencies of performance cited above on the parts of the Title Company, of Attorney Hawkins and the Firm Hawkins, Rhodes and Sharp, and of Defendants Pearson, Gordon, Brown, McElwee, McKiernan and Duncan, wherein these parties each breached their express and implied warranties of good faith and adherence to prevailing law, the plaintiff not only lost the participation at the foreclosure sale of a viable, able and interested bidder, but sustained as well a variety of other provable consequential damages in the amount of no less than three million dollars.

68. WHEREFORE, the plaintiff respectfully prays for judgment against each of the above enumerated Defendants for the full cited damages herein described, with treble damages as provided under 18 U.S.C. Sections 1961 – 1968, plus all interests and costs of this Action, plus other awards which the Court may deem proper, together with any and all damages awardable under Massachusetts General Laws and under Nevada Revised Statutes relating to Consumer Fraud and to Deceptive Trade Practices committed by each of the above cited Defendants.

PLAINTIFF RESPECTFULLY REQUESTS TRIAL BY JURY ON ALL POINTS SO TRIABLE.

s/ A.G. Edwards Jr.
A. G. Edwards Jr., plaintiff

May 22, 1992

APPENDIX F — MOTION TO DISMISS OR TRANSFER OF PRINCE A. HAWKINS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 91-346-S

A. G. EDWARDS, JR.,

Plaintiff

v.

FIRST AMERICAN TITLE COMPANY, ET AL.,

Defendants

MOTION TO DISMISS OR TRANSFER

Prince A. Hawkins, individually and on behalf of the law firm of Hawkins, Rhodes & Sharp (hereafter collectively referred to as "Hawkins"), by his attorneys, Nelson, Kinder, Mosseau & Gordon, P.C., moves the Court as follows:

1. To dismiss the action, pursuant to F.R.Civ.P. 12(b)(2), for lack of personal jurisdiction over Hawkins, because the claims asserted do not arise from any of the acts enumerated in RSA 510:4, and Hawkins has no "minimum contacts" with the State of New Hampshire to justify the exercise of this Court's jurisdiction over Hawkins.

2. To dismiss the action for failure to state a claim, pursuant to F.R.Civ.P. 12(b)(6), in that the First Amended Complaint and plaintiff's admissions on the record make clear that plaintiff's asserted causes of action are barred by the applicable statute of limitations.

3. To dismiss this action on the ground of improper venue under 28 U.S.C. § 1391(a) and (b) and § 1406(a), or, in the alternative, to transfer the action, pursuant to 28 U.S.C. § 1404(a), to Nevada, where the events occurred, where the witnesses are located, where the property is located, and where Nevada law may be applied by a Nevada court.

4. If the case is not dismissed, to transfer this case to to Nevada, because the transaction occurred in Nevada, the documents and witnesses are located in Nevada, and Nevada law will govern.

5. To award Hawkins his costs and fees under F.R.Civ.P. 11 for asserting claims against Hawkins where the lack of personal jurisdiction is clear; for asserting a claim under the Racketeer Influenced and Corrupt Organization Act ("RICO") without any factual basis; and for asserting claims which are patently time barred.

6. Hawkins submits the Affidavit of Prince A. Hawkins, Esq., and a Memorandum of Law in support of this Motion to Dismiss.

7. Pursuant to Local Rule 11, counsel for Hawkins states that she attempted to obtain the concurrence of Mr. Edwards in this motion, but Mr. Edwards did not return her telephone call.

WHEREFORE, defendants Prince A. Hawkins and Hawkins, Rhodes & Sharp respectfully request this Honorable Court:

A. To dismiss this action with prejudice;

B. In the alternative, to transfer the action to Nevada; and

Appendix F

C. To grant such other and further relief as this Court deems just and proper, including costs and fees under F.R.Civ.P. 11.

Respectfully submitted,

PRINCE A. HAWKINS,

By his Attorneys:
NELSON, KINDER, MOSSEAU & GORDON, PC

Dated: *12-28-92*

By: s/ Martha V. Gordon
Martha V. Gordon, Esquire - #963
99 Middle Street
P. O. Box 1510
Manchester, NH 03105
(603) 647-1800

CERTIFICATE OF SERVICE

I hereby certify that a copy. of the foregoing Motion to Dismiss or Transfer was this day forwarded, postage prepaid, to A. Greer Edwards, Jr. (pro se), P.O. Box 208, R.R. #1, Wilton Center, NH 03086; and to James E. Morris, Esq., Orr & Reno, P.A., P.O. Box 709, Concord, NH 03302-0709.

s/ Martha V. Gordon
Martha V. Gordon, Esquire

APPENDIX G — MOTION TO DISMISS OR TRANSFER VENUE OF DEFENDANT JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

CIVIL ACTION NO. C-91-346-JD

A. G. EDWARDS, JR.,

Plaintiff

v.

FIRST AMERICAN TITLE COMPANY,
JOHN HANCOCK MUTUAL LIFE
INSURANCE COMPANY,
PRINCE HAWKINS,
HAROLD PEARSON, III,
WILLIAM GORDON,
JOHN G. McELWEE,
STEVEN BROWN,
THOMAS L. McKIERNAN, and
ARTHUR DUNCAN,

Defendants

MOTION TO DISMISS OR TRANSFER VENUE OF DEFENDANT JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY

Defendant John Hancock Mutual Life Insurance Company ("John Hancock") moves to dismiss Plaintiff's First Amended Complaint, or transfer venue, to the District of Nevada, on the following grounds:

Appendix G

1. Plaintiff's claims against John Hancock should be dismissed because plaintiff has already commenced a prior pending action against John Hancock in the United States District Court for the District of Massachusetts, Civil Action No. 91-10237-K, which action is still pending before Judge Robert E. Keeton in the District of Massachusetts;

2. Plaintiff's claims against John Hancock are barred under the doctrine of res judicata; and

3. Plaintiff's claims against John Hancock are barred under the applicable statutes of limitation.

4. In the alternative, Plaintiff's claims should be transferred under 28 U.S.C. §§ 1404(a) to the District of Nevada.

5. Defendant has made a good faith attempt to obtain concurrence in the relief sought herein.

6. In support of this motion, John Hancock submits its Memorandum of Law which is filed herewith.

REQUEST FOR ORAL ARGUMENT

Defendant John Hancock believes that oral argument may assist the Court and therefore requests oral argument.

Respectfully submitted,

JOHN HANCOK MUTUAL LIFE INSURANCE COMPANY

Appendix G

By Its Attorneys,

ORR & RENO
One Eagle Square
P. O. Box 709
Concord, NH 03302-0709
(603) 224-2381

By: s/ Richard B. Couser
Richard B. Couser # 519

Of counsel:

Edward S. Rooney, Jr.
LYNE, WOODWORTH & EVARTS
600 Atlantic Avenue
Boston, MA 02210
(617) 523-6655

CERTIFICATION

I hereby certify that a copy of the foregoing pleading has this date been forwarded to A.G. Edwards, Jr., Box 208, RR #1, Bennington Battle Trail, Wilton Center, NH 03086.

s/ Richard B. Couser
Richard B. Couser # 519

APPENDIX H — MOTION TO DISMISS OF DEFENDANTS HAROLD PEARSON, III, WILLIAM GORDON, JOHN G. McELWEE, STEVEN BROWN, THOMAS L. McKIERNAN AND ARTHUR DUNCAN

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

CIVIL ACTION NO. C-91-346-JD

A. G. EDWARDS, JR.,

Plaintiff

v.

FIRST AMERICAN TITLE COMPANY,
JOHN HANCOCK MUTUAL LIFE
INSURANCE COMPANY,
PRINCE HAWKINS,
HAROLD PEARSON, III,
WILLIAM GORDON,
JOHN G. McELWEE,
STEVEN BROWN,
THOMAS L. McKIERNAN, and
ARTHUR DUNCAN,

Defendants

MOTION TO DISMISS OF DEFENDANTS HAROLD PEARSON, III, WILLIAM GORDON, JOHN G. McELWEE, STEVEN BROWN THOMAS L. McKIERNAN and ARTHUR DUNCAN

Defendants Harold Pearson, III, William Gordon, John G.

Appendix H

McElwee, Steven Brown, Thomas L. McKiernan and Arthur Duncan move to dismiss Plaintiff's First Amended Complaint on the following grounds:

1. Plaintiff's claims should be dismissed under Federal Rule 12(b)(2) for lack of jurisdiction over the person of the defendants;

2. Plaintiff's claims should be dismissed under Federal Rule 12(b)(5) for insufficiency of service of process on the defendants;

3. Plaintiff's claims are barred under the applicable statutes of limitation; and

4. Plaintiff's claims should be dismissed, or in the alternative transferred, under Federal Rule 12(b)(3) for improper venue.

5. The moving parties have made a good faith attempt to obtain concurrence in the relief sought herein.

6. In support of this motion, defendants submit their Memorandum of Law which is filed herewith.

REQUEST FOR ORAL ARGUMENT

Defendants believe that oral argument may assist the Court and therefore requests oral argument.

Respectfully submitted,

HAROLD PEARSON III,
WILLIAM GORDON,
JOHN G. McELWEE,
STEVEN BROWN,

Appendix H

THOMAS McKIERNAN AND
ARTHUR DUNCAN

By Their Attorneys,

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By: s/ Richard B. Couser
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Of counsel:

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(617) 523-6655

CERTIFICATION

I hereby certify that a copy of the foregoing pleading has this date been forwarded to A.G. Edwards, Jr., Box 208, RR #1, Bennington Battle Trail, Wilton Center, NH 03086.

s/ Richard B. Couser
Richard B. Couser # 519

Supreme Court, U.S.
FILED
JUL 26 1994
OFFICE OF THE CLERK

No. 93-2099

IN THE SUPREME COURT OF
THE UNITED STATES

October Term 1993

A.G. Edwards, Jr., Petitioner
v.
First American Title Insurance Company, John Hancock Mutual Life Insurance Company, et al., Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS FIRST AMERICAN TITLE INSURANCE COMPANY, JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, HAROLD PEARSON III, WILLIAM GORDON, JOHN G. MCELWEE, STEPHEN BROWN, THOMAS L. MCKIERNAN, AND ARTHUR DUNCAN IN OPPOSITION TO PETITION

Richard B. Couser
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Counsel for Respondents First American Title Insurance Company, John Hancock Mutual Life Insurance Company, Harold Pearson III, William Gordon, John G. McElwee, Stephen Brown, Thomas L. McKiernan, and Arthur Duncan

July 26, 1994

BEST AVAILABLE COPY

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CORPORATE DISCLOSURE STATEMENT

Defendant First American Title Insurance Company is a wholly owned subsidiary of First American Financial Corporation, a California corporation which has issued shares to the public. First American Title Insurance Company does not have any other parent companies or subsidiaries that have issued shares to the public.

Defendant John Hancock Mutual Insurance Company is a mutual insurance company that is owned by its policyholders. The following is a list of its subsidiaries and affiliates that have issued shares to the public:

Delmar Petroleum, Inc.
Delta & Pine Land Co.
Gulf States Gas Pipeline Co.
Holmes Protection Group, Inc.
Hotel Property Holdings, Inc.
Nahama & Weagant Energy Co.
P.T. Asuransi Pensun Bumiputera
National Electronic Information Corp.
International Human Resources

Development Corp.
Dallas Gas & Electric
British American Life
Insurance Berhad
The Interlife Assurance Co., Ltd.
Energy Investors Mgmt., Inc.
Balanced Planning
Insurance Agency, Ltd.
British American Life Assurance
Company Pte., Ltd.
First Signature Bank & Trust
John Hancock International
Services, S.A.
John Hancock International
Services Pte., Ltd.

QUESTIONS PRESENTED

1. Did the court of appeals err as a matter of law in ruling that the plaintiff's claims against the non-corporate defendants should be dismissed and could not be transferred to another federal district court, where the district court in which the claims were brought did not have personal jurisdiction over the non-corporate defendants and all applicable statutes of limitations had expired before the non-corporate defendants were made parties to the litigation?

2. Under the foregoing circumstances, did the court of appeals err as a matter of law in declining to rule that the district court should exercise personal jurisdiction over all defendants under 18 U.S.C. § 1965(b)?

STATEMENT OF THE CASE

The following facts were alleged by the plaintiff in his complaint and amended complaint and were cited by the trial court in its order dated March 12, 1993. For purposes of the petition for a writ of certiorari only, the defendants do not dispute these facts.

In 1973, the plaintiff-petitioner, A.G. Edwards, Jr., and two other persons organized a partnership, Saval Ranching Company ("Saval"), to purchase and operate two commercial cattle ranches in Nevada. In 1975 and 1976, Saval borrowed approximately $1,500,000 from John Hancock Mutual Life Insurance Company ("John Hancock"), secured by deeds of trust on the ranches. The deeds of trust were executed by Saval, John Hancock, and First American Title Insurance Company ("First American") as John Hancock's trustee. Subsequently, the United States

Department of Agriculture loaned money to Saval, secured by deeds of trust on the same ranches. See Appendix C at 20.

In 1983, Saval became delinquent on the notes to John Hancock. In 1985, the plaintiff became the sole owner of Saval. In 1985, John Hancock, through its trustee, First American, foreclosed on the ranches. Hawkins, Rhodes & Sharp ("HR&S"), a Nevada law firm, and Prince A. Hawkins ("Hawkins"), a partner in HR&S, acted as legal counsel for John Hancock in connection with the foreclosure proceedings. See id.

The deeds of trust securing John Hancock's loans expressly included the mineral, gas and oil rights of the properties. In preparing for the foreclosure sale, however, First American excepted the mineral, gas and oil rights from the published description of the properties to be sold. The plaintiff

attended the foreclosure sale but was not allowed to bid on the properties. The United States purchased the properties at the foreclosure sale for $1,231,915.60 and acquired the release of John Hancock's interest in the properties. The United States then brought suit against the plaintiff in the United States District Court for the District of Nevada to recover a $600,000 deficiency. See id.

On January 5, 1998, the Nevada court ruled that First American had violated Nevada's foreclosure statutes by excepting the mineral, gas and oil rights from the published description of the properties, and invalidated the foreclosure. In 1989, the United States and the plaintiff entered into a settlement agreement pursuant to which the plaintiff paid $400,000 to the United States and the United States transferred to the

plaintiff all its interests in the properties. See id. at 20-21.

On January 25, 1991, the plaintiff filed suit against John Hancock in the United States District Court for the District of Massachusetts. The suit, which included claims for negligence and for breach of contract, sought damages for the underinclusive property description in the notices of the foreclosure sale of the Saval ranches. The district court dismissed the negligence claim as time-barred, and dismissed the contract claim on the merits. On September 4, 1992, the United States Court of Appeals for the First Circuit affirmed the dismissal of the negligence claim, vacated the dismissal of the contract claim, and remanded for further proceedings. See Edwards v. John Hancock Mut. Life Ins. Co., 973 F.2d 1027 (1st Cir. 1992).

Independent of his action in the federal district court in Massachusetts, the plaintiff commenced the present action on August 12, 1991, by filing a complaint against First American Title Insurance Company of Nevada ("First American Nevada"), a Nevada corporation, in the United States District Court for the District of New Hampshire. The complaint alleged breach of contract and negligence arising out of the foreclosure sale. See Appendix D.

On June 2, 1992, the plaintiff filed an amended complaint which substituted First American, a California corporation, for First American Nevada. In addition, the amended complaint added nine defendants: John Hancock; HR&S; Hawkins; and Harold Pearson III, William Gordon, John G. McElwee, Steven Brown, Thomas L. McKiernan and Arthur Duncan (collectively, the

"individual Hancock defendants"). See Appendix E.

On March 23, 1993, the district court in New Hampshire issued an order (1) dismissing the claims against the eight non-corporate defendants for lack of personal jurisdiction, (2) granting John Hancock's motion to dismiss because the plaintiff's prior action against John Hancock remained pending in the district court in Massachusetts, and (3) granting First American's motion to transfer the claim against it to the United States District Court for the District of Nevada.

On July 8, 1993, the district court issued an order which denied the plaintiff's motion for reconsideration. On July 9, 1993, the district court entered a final judgment for the individual Hancock defendants, John Hancock, HR&S and Hawkins.

The plaintiff filed a notice of appeal to the United States Court of Appeals for the First Circuit on August 6, 1993. On March 29, 1994, the court of appeals affirmed the district court's judgment in its entirety.

The plaintiff filed his petition for a writ of certiorari with this Court on June 26, 1994. In his petition, he has sought review only of the order dismissing the action against the eight non-corporate defendants for lack of personal jurisdiction. He has not sought review of the order to the extent that it dismissed the action against John Hancock and transferred the claim against First American to the district court in Nevada. Thus, the only issue presented here is whether the claims against the non-corporate defendants were properly dismissed.

In his appeal to the First Circuit, the plaintiff did not dispute the district court's finding that it did not have personal jurisdiction over the non-corporate defendants.[1] Rather, he argued that, if the district court in New Hampshire did not have jurisdiction, it should have transferred the claims to the United States District Court for the District of Massachusetts pursuant to 28 U.S.C. § 1631. See Appendix A at 5-6. The court of appeals rejected this argument because it found that, in addition to the absence of personal jurisdiction, all of the claims against the non-corporate defendants were barred by the applicable statutes of limitations. It is

---

[1] In a letter written to the court of appeals after he filed his brief, the plaintiff argued for the first time that the district court could assert jurisdiction over all defendants under 18 U.S.C. § 1965(b).

this ruling that the plaintiff now challenges.

SUMMARY OF ARGUMENT

The petition for writ of certiorari should be denied because there are no special or important reasons for granting it. The court of appeals simply applied settled law to the undisputed facts of the case. There are no novel or complicated legal or factual issues, nor is the court of appeals' decision inconsistent with the decisions of any other United States court of appeals, of any relevant state court of last resort, or of this Court.

The court of appeals properly determined that all of the plaintiff's claims against the non-corporate defendants were barred by the applicable statutes of limitations, because those defendants were first named as parties in the plaintiff's amended complaint, which was filed more than

six years after the causes of action accrued. The court also properly determined that--although the plaintiff never raised the issue--the plaintiff's amended complaint did not relate back to the time the original complaint was filed. Finally, the court correctly ruled that subsequent losses allegedly suffered by the plaintiff in 1990 as a result of the same acts of the defendants did not move forward the date on which his causes of action accrued. Based on these rulings the court correctly held that, because the actions were time-barred, the claims could not be transferred to another federal district court, and must therefore be dismissed.

I. THE COURT OF APPEALS CORRECTLY RULED THAT THE PLAINTIFF'S CLAIMS AGAINST THE INDIVIDUAL HANCOCK DEFENDANTS SHOULD BE DISMISSED AND COULD NOT BE TRANSFERRED PURSUANT TO 28 U.S.C. § 1631.

The district court correctly dismissed the action against the individual Hancock defendants for lack of personal jurisdiction in New Hampshire. See Appendix C at 21-24. The plaintiff did not appeal the court's ruling that it did not have personal jurisdiction. Instead, the plaintiff appealed the district court's decision not to transfer his dismissed claims against the individual Hancock defendants to the United States District Court for the District of Massachusetts pursuant to 28 U.S.C. § 1631. The court of appeals properly rejected this argument because the plaintiff's claims against the individual Hancock defendants were barred by the applicable statutes of limitations.

A. The Plaintiff's Claims Against the Individual Hancock Defendants Are Barred by the Applicable Statutes of Limitations and Therefore Cannot Be Transferred to a Court that Has Personal Jurisdiction over the Defendants.

A federal court which lacks jurisdiction over an action may not transfer the action to another federal court pursuant to 28 U.S.C. § 1631 if the action is time-barred in the federal courts. Hays v. Postmaster General, 868 F.2d 328, 331 (9th Cir. 1989); Hardesty v. Benefits Review Board, 783 F.2d 138, 139 (8th Cir. 1986); Billops v. Department of the Air Force, 725 F.2d 1160, 1163 (8th Cir. 1984) ("A transfer can remedy the mistake of filing in the wrong court, but not the mistake of filing in an untimely manner.").

There is no dispute that the event about which the plaintiff complains--the allegedly defective foreclosure sale of his Nevada property--took place on August 15,

1985. Thus, the date from which the applicable statutes of limitations began to run is August 15, 1985. Any claims which the plaintiff wanted to assert against the individual Hancock defendants had to be made within the applicable limitations period starting from this date of accrual.

The plaintiff filed his amended complaint--which named the individual Hancock defendants as defendants in this action for the first time--on June 2, 1992. This was over six years and nine months after the date on which any cause of action accrued against the individual Hancock defendants. None of the causes of action asserted by the plaintiff has a limitations period that exceeds six years.

In diversity cases, federal courts apply the statute of limitations that a court of the forum state would apply. See Keeton v. Hustler Magazine, Inc., 465 U.S.

770, 779 & n.10 (1984); Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953); Gonsalves v. Flynn, 981 F.2d 45, 47-49 (1st Cir. 1992). Thus, the New Hampshire statute of limitations ordinarily applies to actions brought in the United States District Court for the District of New Hampshire. If the plaintiff's claims against the individual Hancock defendants were to be transferred to the federal district court in Nevada or Massachusetts, it is not necessarily clear whether the New Hampshire statute of limitations, or the Nevada or Massachusetts statute of limitations, would apply.[2]

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[2] The United States Court of Appeals for the Ninth Circuit, in which Nevada is located, holds that the state law of the transferor forum applies to § 1404(a) transfers but that the state law of the transferee forum applies to § 1406(a) transfers. Nelson v. International Paint Co., 716 F.2d 640, 643 (9th Cir. 1983); accord Martin v. Stokes, 623 F.2d 469 (6th Cir. 1980). The United States District Court for the District of Massachusetts holds that the statute of limitations of the

However, regardless of whether the New Hampshire, Massachusetts, or Nevada statute of limitations were to be applied, all of the plaintiff's actions against the individual Hancock defendants are time-barred.

In the amended complaint, the plaintiff asserted five different causes of action: (1) a contract action, see Amended Complaint ¶ 12, Appendix E at 40; (2) an action based on breach of an implied covenant of good faith and fair dealing, see id. ¶ 66, Appendix E at 53; (3) an action under 18 U.S.C. §§ 1961-1968, the Racketeer Influenced and Corrupt Organizations Act (RICO), see id. ¶ 9, Appendix E at 39; (4)

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transferor forum applies to § 1404(a) transfers. Tidgewell v. Loon Mountain Recreation Corporation, 820 F. Supp. 630, 633 (D. Mass. 1993); accord Gonzalez v. Volvo of America Corp., 734 F.2d 1221 (7th Cir. 1984); Schreiber v. Allis-Chalmers Corp., 611 F.2d 790 (10th Cir. 1979).

an action under Massachusetts General Laws ch. 93A, the Massachusetts Consumer Protection Act, see id. ¶ 10, Appendix E at 26; and (5) an action under Nevada Revised Statutes §§ 41.6000, 598.410-413, and 598.490, pertaining to deceptive trade practices, see id. ¶ 11, Appendix E at 39-40.

In New Hampshire, the limitations period for an action upon a contract that arose before July 1, 1986, was six years. N.H. Rev. Stat. Ann. 508:4, I (1983 & Supp. 1993).[3] In Nevada, the limitations period for a contract action not founded upon an instrument in writing is four years, Nev. Rev. Stat. § 11.190 2(c) (Supp. 1991), and the limitations period for a contract action

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[3] Personal actions arising on or after July 1, 1986, have a limitations period of three years. See N.H. Rev. Stat. Ann. 508:4, I (Supp. 1993). It is not disputed, however, that the plaintiff's cause of action, if any, arose in 1985.

founded upon an instrument in writing is six years, id. § 11.190 1(b). In Massachusetts, the limitations period for a contract action is six years. Mass. Gen. L. ch. 260 § 2 (1992). Accordingly, the plaintiff's contract action is time-barred.

In New Hampshire, the limitations period for an action based on breach of an implied covenant of faith was six years for actions arising before July 1, 1986. N.H. Rev. Stat. Ann. 508:4, I (Supp. 1992). In Nevada, the period is four years. Nev. Rev. Stat. § 11.190 2(c) (Supp. 1991); David v. State Farm Fire & Cas. Co., 545 F. Supp. 370, 372 (D. Nev. 1982). In Massachusetts, the period is six years. Mass. Gen. L. ch. 260 § 2 (1992). Accordingly, the plaintiff's action for breach of an implied covenant of good faith is time-barred.

The limitations period for a civil RICO enforcement action, which is established by

the Clayton Act, is four years, regardless where the action is brought. Agency Holding Corp. v. Malley Duff & Associates, Inc., 483 U.S. 143, 156 (1987). Consequently, the plaintiff's civil RICO action is time-barred.

The limitations period for an action brought under Mass. Gen. L. ch. 93A is four years. Mass. Gen. L. ch. 260 § 5A (1992). Thus, the plaintiff's action under Mass. Gen. L. ch. 93A is time-barred.

Finally, the limitations period for an action brought under the Nevada deceptive trade practices statute is four years. Nev. Rev. Stat. § 598A.220 (1986). Thus, the plaintiff's action under the Nevada deceptive trade practices statute is time-barred.

In short, none of the actions brought by the plaintiff against the individual Hancock defendants was brought within the

applicable limitations period. In fact, the plaintiff admitted at the district court level and in his brief to the court of appeals that all statutes of limitations for his claims had expired by August 15, 1991. See Appendix A at 8. Accordingly, the plaintiff's claims against the individual Hancock defendants were time-barred in every federal court to which they might have been transferred when he filed his amended complaint on June 2, 1992.

The plaintiff might have argued that his amendment to the complaint "related back" to the date of the original complaint under Rule 15(c), so that the claims that were subject to a six-year statute of limitations were not barred. However, the plaintiff never raised this argument in either the district court or the court of appeals (although the defendants addressed the issue), nor has he raised the issue

here. He therefore has long since waived the argument. Moreover, the court of appeals did address this issue and properly concluded that there would be no merit to the argument even if the plaintiff had not waived it. See Appendix A at 9-10.

B. The Subsequent Injury Allegedly Suffered by the Plaintiff in 1990 Did Not Change the Accrual Date for His Causes of Action.

Although the plaintiff acknowledged at the district court level and in his brief to the court of appeals that his causes of action accrued on August 15, 1985, and thus became barred no later than August 15, 1991, he sought to retreat from that acknowledgment in his reply brief. There, he stated that his causes of action did not accrue until "mid-1990," when the United States Forest Service allegedly canceled his grazing permit for livestock on the Saval ranches. See Appendix A at 8. He alleged

that this cancellation "[d]irectly derived from" the defective foreclosure sale and caused him substantial economic harm.

The court of appeals properly rejected this argument, observing that

> Edwards was on notice of possible substantial injury as of the August 1985 foreclosure sale, when the underinclusive property description may have caused the Saval ranches to be sold for a lower price. A cause of action accrues when a plaintiff has "knowledge, actual or attributed, of both harm to it and the likely cause of such harm, . . . sufficient to stimulate further inquiry which was likely to alert it to a cause of action against a defendant." The fact that a plaintiff subsequently suffers some additional harm that may be traced to the same likely cause does not delay accrual of the cause of action.

Id. (citations omitted) (quoting Hanson Housing Auth. v. Dryvit System, Inc., 29 Mass. App. 440, 446, 560 N.E.2d 1290, 1294 (1990), review denied, 409 Mass. 1101, 565 N.E.2d 792 (1991), and citing Rowe v. John Deere, 130 N.H. 18, 21-23, 533 A.2d 375,

376-78 (1987); Sorensen v. Pavlikowski, 94 Nev. 440, 443-44, 581 P.2d 851, 853-54 (1978)).

II. THE DISTRICT COURT DOES NOT HAVE JURISDICTION UNDER 18 U.S.C. § 1965(b).

Approximately one month after he filed his brief in the court of appeals, the plaintiff sent a letter to the court in which he asserted, for the first time, that the district court in New Hampshire should have exercised jurisdiction over all of the defendants under 18 U.S.C. § 1965(b), because the action included a claim under 18 U.S.C. § 1964, and the court unquestionably had personal jurisdiction over one of the defendants, John Hancock. In his petition for certiorari, he has again raised that issue. He appears to acknowledge, however, that jurisdiction under section 1965(b) becomes an issue only if he can overcome the statute of limitations hurdle.

Section 1965(b) states:

> In any action under section 1964 . . . in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned . . . .

18 U.S.C. § 1965(b). Apart from the fact that this argument was waived by the plaintiff's failure to raise it in the district court or in his notice of appeal, the plaintiff never explained why the "ends of justice" would require the district court in New Hampshire to assert jurisdiction over six non-New Hampshire residents when the plaintiff already had an action pending in Massachusetts based on the same facts.

Moreover, as the plaintiff appears to acknowledge, this issue is rendered moot if the actions were barred by the statutes of limitations. Since the claims were not filed in a timely manner, the question of

whether the district court in New Hampshire might have had jurisdiction over the non-corporate defendants is merely academic.

III. THE COURT'S RULING WAS IN ACCORDANCE WITH LAW, AND DOES NOT RAISE ANY NEW ISSUES.

The plaintiff's stated reason for the Court to grant certiorari seems to be summarized in the following sentence from his writ: "[T]here clearly exists within the Federal Court System a disharmony and potential for substantial injustice, where unforeseen subsequent and consequential injuries are denied redress because a relevant and originating Statute of Limitations period has expired.." Petition at 21. Apparently, the plaintiff objects to the concept that the limitations period for his cause of action begins to run at the time he becomes aware of an injury to him, even though he may subsequently discover a

further injury resulting from the same cause.

Although the plaintiff may not like this result, it is a result based on settled law and sound rationale. Notwithstanding the plaintiff's claim that "State Court decisions . . . cannot control an Appeals Court determination when neither State Court Action has ever been heard on Federal Appeal," see Petition at 18, the long-settled rule is that, in a diversity case, a federal court will apply the statute of limitations that a court of the forum state would apply. See page 14, supra. As stated above, the statutes of limitations of New Hampshire, Massachusetts, and Nevada would all bar the plaintiff's actions against the individual Hancock defendants. Consequently, the court of appeals was merely following established law when it

ruled that the plaintiff's action was barred.

The plaintiff's equitable argument for reversing the court of appeals' order, see Petition at 19-23, appears to be based solely on the fact that the order resulted in the dismissal of his claims. That, of course, is exactly the purpose of a statute of limitations. The fact that one party is unhappy with the result is not a justification for changing the law.

Finally, the plaintiff's argument that he should "have his unskilled appearance treated with more generous tolerance," see id. at 22, is not persuasive. While it may be true that pleadings of a pro se litigant are "[h]eld to less stringent standards than formal pleadings drafted by lawyers," Haines v. Kerner, 404 U.S. 519, 520 (1972), this cannot justify disregarding a statute of limitations merely because the plaintiff is

not represented by counsel. Otherwise, any plaintiff who has missed the filing deadline could avoid the statute of limitations merely by choosing to proceed without counsel.

CONCLUSION

For the foregoing reasons, the respondents respectfully request that the Court deny the petition for a writ of certiorari.

Respectfully submitted,

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CERTIFICATION

I hereby certify that three copies of the foregoing brief have this date been forwarded to A. G. Edwards, Jr., Box 208, RR #1, Bennington Battle Trail, Wilton Center, NH 03086, and Martha V. Gordon, Esquire, Nelson, Kinder, Mosseau & Gordon, P.C., 99 Middle Street, Manchester, NH 03105.

